

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

**OFFICIAL UNSECURED
CREDITORS COMMITTEE**

Plaintiff

v.

GENERAL MOTORS CORP., et al.,

Defendants

Civil No. 94-94-B-H

***RECOMMENDED DECISION ON
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT,
DEFENDANT GENERAL MOTORS CORPORATION'S MOTION TO DISMISS
AND DEFENDANT GENERAL MOTORS ACCEPTANCE CORPORATION'S
MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL***

This case requires the court to determine whether General Motors Corporation (“GM”) and its wholly owned subsidiary, General Motors Acceptance Corporation (“GMAC”), acted unlawfully in connection with the business failure of two Waterville, Maine automobile dealerships. The plaintiff is the Official Unsecured Creditors Committee appointed by the U.S. Bankruptcy Court for the District of Maine to represent unsecured creditors of Joseph Motor Company and Joseph Subaru, both of which sought relief pursuant to Chapter 11 of the Bankruptcy Code in 1992. In its 24-count second amended complaint (“complaint”), the plaintiff alleges breach of fiduciary duties to both the debtors and their creditors, breach of contract, breach of a common-law duty of good faith and fair dealing, intentional interference with contractual relations, common-law conversion, fraud, negligent misrepresentation and civil conspiracy. The complaint also asserts claims arising under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961

et seq., and the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*, as well as claims of fraudulent and preferential transfers pursuant to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* The plaintiff also asserts state-law statutory claims pursuant to a provision of Maine's Uniform Fraudulent Transfer Act, 14 M.R.S.A. § 3571 *et seq.*, and chapter on regulation of business practices among motor vehicle manufacturers, distributors and dealers, 10 M.R.S.A. § 1171 *et seq.* The complaint also includes separate counts seeking equitable subordination of the defendants' rights to those of the unsecured creditors, and seeking to fix liability in the defendants for state sales taxes owed by the debtors.

Pending before the court are GM's motion to dismiss (Docket No. 13), GMAC's motion to dismiss and to strike the plaintiff's request for jury trial (Docket No. 14), GM's motion for summary judgment (Docket No. 68) and GMAC's motion for summary judgment (Docket No. 71).¹ To the extent that the dismissal motions rely on Fed. R. Civ. P. 12(b)(1), they have been withdrawn in light of the court's having revoked the prior reference in this case to the Bankruptcy Court. *See* Report of Status Conference and Order (Docket No. 81). Further, GMAC has indicated that its motion to dismiss is otherwise subsumed by its subsequent motion for summary judgment, with the exception of the jury trial issue raised in the dismissal motion. *Id.* The court has also determined that the motions to dismiss shall be treated as motions to dismiss the second amended complaint. *Id.*

I. Summary Judgment Standards

¹ The plaintiff has requested oral argument on the summary judgment motions, principally to address certain statements appearing in the defendants' reply memoranda that the plaintiff and its counsel deem offensive. *See* Docket No. 114. Satisfied that I am able to address the substantive issues presented on the basis of the parties' written submissions and my own research, I deny the request. *See* Local Rule 19(f).

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is “material” within the meaning of Rule 56(c) if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Context

The relevant facts, viewed in the light most favorable to the plaintiff as the non-moving party, can be summarized as follows.²

a. The Parties and Their Relationships

The plaintiff is the Official Unsecured Creditors Committee appointed by the U.S. Bankruptcy Court for the District of Maine to represent unsecured creditors of the bankruptcy estate of two automobile dealerships, Joseph Motor Company and Joseph Subaru. Complaint (Docket No. 82) ¶ 2; GMAC Answer (Docket No. 110) ¶ 2; GM Answer (Docket No. 112) at ¶ 2. Defendant GM

² In support of their respective positions on the pending summary judgment motions, all parties have submitted statements of material facts as required by Local Rule 19(b). The statement submitted by the plaintiff in response to GM's motion does not attempt to controvert any of the factual assertions made by GM in its Local Rule 19(b) filing. Accordingly, pursuant to Local Rule 19(b)(2), all properly supported factual assertions made in GM's statement of material facts are deemed to be admitted.

A further comment on the quality and the quantity of the parties' factual statements is in order. As the court has recently pointed out, Local Rule 19 is a mechanism for guiding the court with citations to the record for each point of material fact in summary judgment motions. *Pew v. Scopino*, 161 F.R.D. 1 (D. Me. 1995). “A trial judge cannot comb through every deposition, affidavit, pleading, and interrogatory answer in search of disputed factual issues.” *Id.* (noting that parties are bound by their Rule 19 factual statements). The factual statements presented in this case cannot be said to have served their purpose in guiding the court, inasmuch as each contains numerous assertions that are not supported by the record citations provided. Additionally, the factual statements provided by the plaintiff seldom even attempt to provide record citations for each point of material fact. Rather, they make sweeping assertions, liberally seasoned with legal conclusions, followed by lengthy strings of record citations to whole documents or lengthy deposition excerpts. Given that “parties are bound by their Rule 19 Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein,” *id.*, a party that provides that kind of navigational assistance to the court risks running aground. Finally, I note that each party has presented within its legal memoranda lengthy recitations of fact in addition to their Rule 19 statements -- a common practice -- apparently in the belief that it provides a convenience to the court. I have not considered these additional factual statements. *See id.* at 2 n.1 (noting that a party cannot oblige the court to look beyond its Rule 19 statements with additional filings and that “[t]he convenience of the court is best served by direct compliance with Rule 19(b)”).

is a Delaware corporation with its principal place of business in Detroit, Michigan. Affidavit of John S. Bellaver (“Bellaver Aff.”) (Docket No. 70) at ¶ 2. Defendant GMAC, a New York corporation which also has its principal place of business in Detroit, is a wholly owned subsidiary of GM. Complaint ¶ 3; GM Answer ¶ 3; GMAC Answer ¶ 3.

GMAC is engaged in the business of financing automobiles and other motor vehicles for dealers who sell, lease and service products manufactured by GM. Bellaver Aff. ¶ 3. GMAC does not provide financing to all GM dealers, and GM dealers are free to obtain financing from any source. *Id.* GM and GMAC maintain separate payrolls, books and records; the two companies conduct separate directors' meetings and maintain separate corporate minutes of those meetings. *Id.*, ¶¶ 4, 6. GMAC's executives and management team exercise independent day-to-day control over the company, which has its own employees, sales staff and branch offices to maintain contact with the dealers to whom it provides financing. *Id.*, ¶¶ 5, 7, 9. The GMAC branch offices do not share facilities, personnel, space or equipment with GM or its car and truck divisions, which consist of Buick, Chevrolet, GMC Truck, Oldsmobile and Pontiac. *Id.* at ¶ 9 and Exh. A thereto at 48. The business of GMAC is managed by its 14-member board of directors, a majority of whom are GMAC executives; the GMAC board is separate from that of GM. *Id.*, ¶ 4. GMAC prepares its own annual reports and other filings as required by the Securities Exchange Act of 1934. *Id.*, ¶ 6.

GMAC receives certain legal services from GM's legal department. *Id.*, ¶ 8. The attorneys in GM's legal department who are assigned to its finance and insurance practice area essentially devote all of their time to providing legal advice to GMAC and Motors Insurance Corporation, GMAC's insurance subsidiary. *Id.* These attorneys do not provide any services to GMAC other than legal advice and representation. Deposition of General Motors Corporation by John S. Bellaver

(“Bellaver Dep.”) at 37. GMAC reimburses GM for these legal services. Bellaver Aff. ¶ 8. In representing GMAC on matters involving insolvent or potentially insolvent dealers, the GM attorneys consider not just the traditional financial issues that would confront a lender in such situations, but also take into consideration the effect their actions will have on GM as a supplier of automobiles to the dealer or dealers in question. Exh. 2 to Bellaver Dep. at 2 (to be found at Vol. V, Tab 118 of Appendix to Plaintiff's Responses to Defendants' Motions for Summary Judgment (“Plaintiff's Appendix”).³ Indeed, one of GMAC's official corporate missions is to assist in the sale of GM products. Deposition of Harry W. Yergey (“Yergey Dep.”) at 315-16. And, at least in certain circumstances, GMAC exerts control over the shipment of new GM vehicles to dealerships that finance their new car inventory through GMAC. Deposition of Ernest Caraway (“Caraway Dep.”) at 262; Deposition of Donald H. Marden (“Marden Dep.”) at 156, 161.

Joseph Motor Company and Joseph Subaru were both located in Waterville Maine; their president, and the owner of the real estate upon which they were situated, was Herbert W. Joseph, Sr. (“Joseph”). Complaint ¶ 8; GMAC Answer ¶ 8; GM Answer ¶ 8. Elias Joseph, father of Herbert Joseph Sr., founded Joseph Motor Company in 1945; the younger Joseph started working at the dealership in 1954 and ultimately became president of both of the Waterville Joseph dealerships. Deposition of Herbert W. Joseph, Sr. (“Joseph Dep.”), Vol. I at 10-11, 27. Joseph Motor Company operated as a Buick, Oldsmobile and GMC Truck dealer, pursuant to an agreement with GM, prior to its bankruptcy filing in 1992. *Id.* at 11; Vol. II at 90-92. Joseph Subaru operated as a Subaru dealer. *Id.*, Vol. I at 11-12.

³ Hereafter, simple references to “Tab __” will be to the specifically noted tab in either Volume IV or Volume V of the Plaintiff's Appendix.

During the period relevant to this litigation, GM was engaged in a corporate business plan known as “Project 2000.” *Id.*, Vol. III at 123; Deposition of General Motors Corporation by R. James Smith (“Smith Dep.”) at 103. Among the elements of Project 2000 was an assessment of the number of GM dealers that would be appropriate from a marketing and competitive standpoint for each geographic area in the country. *Id.* at 105. Another aspect of the plan was a determination of which specific location or locations are the optimum ones for GM dealerships within a geographic area. *Id.* at 147. Pursuant to Project 2000, GM determined that Waterville should go from three to two GM dealerships, *id.* at 145, that the local Chevrolet and Pontiac dealerships occupied the optimal geographic locations in the Waterville area, *id.* at 170, and that the location of Joseph Motor Company was not considered optimal, *id.* at 171.

b. Prelude to a Financial Crisis at the Joseph Dealerships

In May 1988 Joseph purchased an Oldsmobile and GMC Truck dealership located in Corinna, Maine. Joseph Dep., Vol. I at 12; Vol. II at 132. In August of that year, Joseph purchased a Buick dealership in Portland, Maine owned by John Haverty. *Id.*, Vol. I at 13, 25; Vol. II at 145, 148. Joseph obtained a \$1.3 million loan from GMAC to finance the purchase of the Portland dealership, to provide additional working capital for the Corinna dealership, and to pay off existing indebtedness in connection with the real estate used by the Waterville dealerships. Exh. 1 to Joseph Dep. at 1 (Tab 35); Deposition of GMAC by Elmer C. Sanders, Jr. (“Sanders Dep.”) at 232; Exh. A to Affidavit of E.C. Sanders (“Sanders Aff.”), Appendix to General Motors Acceptance Corporation's Motion for Summary Judgment (“GMAC's App.”) Vol. II. Securing this loan were a first mortgage on the real estate occupied by the Waterville dealerships and owned by Joseph, and

guarantees for the full amount of the loan from both Joseph Motor Company and Joseph Subaru. Complaint ¶¶ 12-13; GMAC Answer ¶¶ 12-13; Exh. 1 to Joseph Dep. (Tab 35) at 2; Exhs. B and C to Sanders Aff. (GMAC's App., Vol. II).

Joseph first learned of the availability of the Corinna dealership when an employee of GM's Oldsmobile division called Joseph to encourage him to make the purchase. Joseph Dep., Vol. I at 54. Joseph decided to purchase the Portland Buick dealership after receiving a letter from Buick Motor Division, a unit of GM, that the dealership had a “planning potential” of 825 new car sales per year. *Id.*, Vol. III at 8-9. A Buick official told Joseph that there was no reason why sales at the dealership should not be twice what they had been under the previous owners, given that the economy in greater Portland was flourishing at the time. *Id.*, Vol. II at 150, 155. In general, Joseph relied heavily on the representations made to him by, and the advice he received from, the automobile manufacturers with whom he did business. *Id.*, Vol. III at 19. Although Joseph understood that “business is business,” he “always relied on the factory as a company like you would rely on a personal friend.” *Id.* It took only two weeks for Joseph to obtain the necessary approvals from GM and GMAC to purchase the Portland dealership; this was an unusually short period of time. *Id.*, Vol. I at 55.

Economic conditions in Portland began to deteriorate after Joseph bought the Buick dealership, and the dealership was never able to meet the level of sales that had been predicted by Buick. *Id.*, Vol. III at 7; Sanders Dep. at 239. It was the unprofitability of the Buick dealership that ultimately brought about the financial downfall of the Joseph automobile businesses. Joseph Dep., Vol. III at 32-33. At some point in either the last quarter of 1989 or the first quarter of 1990, both Joseph Motor Company and Joseph Subaru became insolvent. Deposition of Mark G. Filler (“Filler

Dep.”) at 61-63. By the spring of 1990, GMAC was aware that Joseph Motor Company and Joseph Subaru were experiencing financial difficulties. Exhs. 116, 121, 122 and 123 to Sanders Dep. (Tabs 40, 42-44).

Joseph borrowed another \$600,000 from GMAC in July 1990; again, Joseph Motors and Joseph Subaru each guaranteed the full amount of the loan. Exh. 4 to Joseph Dep. (Tab 46); Exh. D to Sanders Aff. (GMAC's App., Vol. II). Originally, officials at the GMAC branch office in Portland recommended against making another loan to Joseph; this recommendation was overruled as the result of the intervention of Robert Ogden, an executive at GM, and another GM employee identified in the record as Bud Moore.⁴ Sanders Dep. at 414-15, 526-27; Yergey Dep. at 143-55, 332; Exh. 121 to Sanders Dep. at 2 (Tab 42); Exh. 123 to Sanders Dep. at 2 (Tab 44); Exh. 131 to Sanders Dep. at 7-8 (Tab 47); Joseph Dep., Vol. III at 45-46; Exh. 12 to Caraway Dep. at 7 (Tab 73). Ogden also urged Joseph to place his trust in GMAC, assuring Joseph that he could count on GMAC to “be there for you.” Joseph Dep., Vol. III at 47-48. In connection with the 1990 loan, Joseph Motor Company assigned to GMAC the right to receive payment directly from GM on the “open accounts” that Joseph Motor Company had with GM. Exh. F to Sanders Aff. (GMAC's App., Vol.

⁴ The plaintiff offers this factual assertion: “The \$600,000 loan was not made as a credit decision but was made on the basis of GMAC's need to improve its collateral position and obtain the profitable floor plan lines of credit.” Plaintiff's Statement of Material Facts in Dispute (filed in response to GMAC's statement of material facts) (Docket No. 85) (“SMF I”) ¶ 40. The record citations supplied by the plaintiff do not support this proposition.

GM complains that in asserting for summary judgment purposes that GMAC changed its decision on the \$600,000 loan as the result of the intervention of GM, the plaintiff “does not even acknowledge” the testimony from former GMAC executive Harry Yergey that the GM intervention played no role. *See* GM's Analysis of the Committee's Statement of Material Facts in Dispute (appearing as Tab F to Supplemental Appendix of Materials in Support of GM's Motion for Summary Judgment) at 3. It is not necessary for the plaintiff to acknowledge such testimony, but only to demonstrate the existence of a factual dispute on the point. This the plaintiff has done. *See* Sanders Dep. at 526-27 (stating that Ogden's intervention was the reason for the loan approval).

II). A dealership's open accounts consist of net balances payable by GM to the dealer in connection with the sale of automobile parts, warranty work performed by the dealer, and manufacturer's rebates, etc. Sanders Dep. at 206-207.

Concurrent with the 1990 loan transaction, Joseph Motor Company and Joseph Subaru entered into wholesale security agreements with GMAC, pursuant to which GMAC provided wholesale financing (also referred to as “floor plan” financing) for the dealerships' inventory of new vehicles for retail sale. Exhs. 148 (Tab 49) and 149 (GMAC's App., Vol. II) to Sanders Dep.; Exhs. G and H to Sanders Aff. (GMAC's App., Vol. II); Sanders Dep. at 6. Approximately a year later, GMAC undertook floor plan financing of the dealerships' inventory of used cars as well. Sanders Dep. at 407; Exh. 9 to Sanders Dep. (GMAC's App., Vol. II). Floor plan financing involves the lender advancing the purchase price of the vehicle to the manufacturer, with the dealer paying back the lender when the vehicle is sold; the lender retains a purchase money security interest in the vehicle and all proceeds from the sale of that vehicle until the lender is paid. Exh. 148 to Sanders Dep. (Tab 49).

Notwithstanding the loan consummated in 1990, financial difficulties at the Joseph dealerships continued. In January 1991 a GMAC official noted that “[w]e have a case here of no \$ and all players are aware.” Exh. 23 to Sanders Dep. at 2 (Tab 55). In March a GMAC report described the situation with the Joseph dealerships as “critical,” noting that “it appears the assets of Mr. Joseph have been substantially exhausted.” Exhs 3 and 4 to Caraway Dep. (Tabs 59, 63). GMAC began conducting weekly audits at Joseph Motor Company and Joseph Subaru. Exh. 9 to Caraway Dep. (Tab 68). At some point in 1991, GMAC approved Joseph's request for a six-month moratorium on payments of principal by Joseph and his dealerships. Caraway Dep. at 266. Principal

payments in connection with both the \$1.3 million loan from 1990 and the \$600,000 loan from 1991 ceased as of May 1991. Exh. 191 to Sanders Dep. at 2, 7 (Tab 36). GMAC extended the payment moratorium for another six months in December 1991. Exh. 50 to Sanders Dep. (GMAC's App., Vol. II). Joseph and the dealerships ceased making interest payments on the loans as of October 1991 and no further payments were made thereafter. Exh. 191 to Sanders Dep. at 2-3, 7-8 (Tab 36). GMAC agreed to the second six-month moratorium because it believed its own exposure to losses would be less if the dealerships stayed in business. Yerkey Dep. at 378.

c. July 1991: The Crisis Erupts

In July 1991, Joseph contacted GMAC to advise that certain checks issued by his dealerships to GMAC would be returned by the bank because of insufficient funds. Caraway Dep. at 226. Such an event (*i.e.*, the sale of a vehicle by a dealership when the dealership is unable or unwilling to pay the financial institution and cause the release of the institution's security interest in the vehicle) is commonly referred to, in the record and apparently throughout the industry, as a sale of vehicles “out of trust.” GMAC reacted to these out-of-trust sales in at least three ways. First, it called GM and caused shipments of new cars to the dealerships to cease. Joseph Dep., Vol. II at 14. Second, GMAC suspended the dealerships' wholesale lines of credit, which meant that the dealerships could not acquire additional new cars. Exh. 9 to Caraway Dep. at 2 (Tab 68). Finally, GMAC dispatched personnel to Joseph Motor Company and Joseph Subaru to conduct an inventory audit to determine whether any vehicles had been sold by the dealerships without payment to GMAC as required by the floor plan financing agreements. Caraway Dep. at 231-33; Sanders Dep. at 261. The audit revealed that the Joseph dealerships had sold as many as 16 cars without paying GMAC for them. Exh. 11

to Caraway Dep. (Tab 81). As a consequence, GMAC placed one of its employees on the premises of the dealerships to assure that GMAC collected funds for each vehicle sold by the dealerships. Caraway Dep. at 231, 239; Sanders Dep. at 262. This person is referred to in the record, and apparently in industry parlance, as a “keeper” or a “babysitter.” See Caraway Dep. at 162; Deposition of Edward Oliver (“Oliver Dep.”) at 61.

At the onset of this crisis, GMAC officials assured Joseph that as soon as he came up with the cash to cover the cars his dealerships had sold without making the required payments to it, GMAC would go back to “business as usual” in its dealings with him. Joseph Dep., Vol. I at 81-82. This assurance came only days after Ernest Caraway, GMAC's Portland-based control branch manager, had concluded that Joseph's dealerships “will not survive or at least cannot survive in their present structure.” Exh. 8 to Caraway Dep. (Tab 67). As a condition for returning to business as usual, Joseph was required to present GMAC with a certified check for a sum in excess of \$100,000. Joseph Dep., Vol. I at 176. Joseph raised the money by taking out a mortgage on a personal residence. *Id.* at 178. He then presented a certified check to Caraway on July 30, whereupon Caraway told Joseph that, in fact, GMAC would not be returning to business as usual. *Id.* at 82, 87; Caraway Dep. at 330-31. Caraway stated that GMAC would not restore the dealerships' floor plan financing until Joseph raised additional capital and showed GMAC a business plan. Joseph Dep., Vol. I at 87. Indeed, GMAC did not restore the dealerships' credit, permitting them to acquire more new vehicles, until the two sides successfully negotiated a workout agreement several weeks later. *Id.* at 98-99.

Subsequent to the July 1991 incident, GMAC made a practice of holding the certificates of origin and titles for the vehicles being sold by the dealerships, releasing the documents only upon

receipt of funds from the dealership in payment for the vehicles. Deposition of Penny Hawkins (“Hawkins Dep.”), Vol. I at 37-40; 130. GMAC would not accept a check from the dealerships unless the check was certified. *Id.*, Vol. II at 15. It was the keeper's practice to take all of the sales proceeds for the vehicles in question, even if some of the money provided by the purchaser had been paid as sales tax. Joseph Dep., Vol. II at 43-44, 57. The keeper was instructed to perform his work in an inconspicuous manner so as not to alert the public to his presence. Caraway Dep. at 186-87; Sanders Dep. at 62; Deposition of Jay F. Williams (“Williams Dep.”) at 136. The GMAC keeper did not participate in the management of either dealership.⁵ Caraway Dep. at 187.

⁵ The plaintiff contends that GMAC assumed effective control of the Joseph dealerships and began making key business decisions on their behalf. *See* Plaintiff's SMF I, ¶¶ 6 (“the Debtors were forced to limit staff and operations”), 48 (“GMAC took control of virtually all of the fundamental operating aspects and revenue sources of the Debtors' dealerships”) and 51 (“GMAC, with the assistance of GM and its in-house counsel, orchestrated a series of events to take effective control of the Debtors dealerships”). I believe that a careful review of the record, even in the light most favorable to the plaintiff, does not support the assertion that GMAC took effective control of the Joseph dealerships. The record demonstrates that Joseph agreed to take certain actions in consultation with GMAC officials. *See, e.g.*, Exh. 10 to Caraway Dep. at 2 (Tab 71) (describing Joseph's promise in August 1991 to GMAC's Caraway that Joseph would seek to sell the Subaru dealership, move his GM sales force into the Subaru dealership's building, lay off the Buick sales manager and another employee, replace these officials with his sons, make further personnel cuts “even if [Joseph's] wife has to answer the phone,” and limit the ordering of supplies). The record also supports the assertion that GMAC was actively pressuring Joseph to come up with some kind of plan to cope with the financial crisis at the dealerships. *See* Joseph Dep., Vol. III at 75 (noting that Caraway “wanted some kind of plan from [the Joseph dealerships]”). However, the only reasonable inference to be drawn from the record is that any plan to cut costs in the summer of 1991, and the key business decisions reflected therein, were purely a creation of Joseph in an effort both to return to profitability and to restore his financing relationship with GMAC to the *status quo ante*. On August 22, 1991 Joseph wrote to an official of GM to complain about his dealings with GMAC. Exh. 9 to Joseph Dep. (Tab 78). In that letter, Joseph refers to his August 16, 1991 conversation with Caraway, in which he told Caraway of the “substantial changes [Joseph] was making in [his] dealership that would save [him] a great deal of money,” *id.* at 3, and attaches to the letter an August 20, 1991 letter to Caraway and Assistant Control Branch Manager Elmer C. Sanders, Jr. designed to bring GMAC “up to date on some substantial changes we have made[.]” In his deposition, Joseph refers to these measures as “things that we were trying to do to reduce our costs and expenses.” Joseph Dep., Vol. III at 74. The fact that Joseph was committed to restore a measure of stability to
(continued...)

Other actions taken by GMAC imposed significant new burdens on the Joseph dealerships. GMAC discontinued the practice of allowing the dealerships to write checks against their accounts with GMAC. Joseph Dep., Vol. II at 35. GMAC refused to accept checks from the dealerships' retail customers unless a dealership employee travelled to the issuing bank to have the check certified. *Id.*, Vol. III at 145. Officials of GMAC's Portland office would frequently call the dealerships' accounting manager and quiz her about details of the businesses' financial transactions, and would examine the dealerships' checking account records every three or four weeks. *Id.*, Vol. II at 17-18. These demands became so time consuming for the accounting manager that she complained to Joseph she was spending three-quarters of her time dealing with GMAC and did not have time to do her bookkeeping tasks. *Id.* at 19. GMAC also required a copy of the dealerships' bank statements each month. *Id.* at 18. If one of the Joseph dealerships wanted to engage in a "dealer swap" with a non-GM dealership, GMAC insisted that the non-GM dealer pay for the vehicle it was acquiring in advance -- making it difficult for the Joseph dealerships to engage in this kind of transaction. *Id.*, Vol. I at 101-02.

GMAC also began exercising its right, as set forth in the 1990 loan agreement, to receive directly from GM any payments due the dealerships on their open accounts with GM. *Id.* at 78; Marden Dep. at 169-70. Neither Joseph nor his attorney, Donald Marden, complained to GM about

⁵(...continued)

his businesses, and thereby return to the good graces of the entity that held a security interest in virtually his entire product inventory, does not mean that the entity assumed control of the businesses. Indeed, in January 1990, when Fleet Bank was still providing the floor plan financing for the Joseph dealerships, Joseph wrote a letter to that institution and characterized the information provided therein as part of the process of "outlining [his] efforts to reduce expenses and bring [the dealerships] into a profitable 1990." *Id.*, Vol. I at 121; Exh. 17 to Joseph Dep. (GMAC's App., Vol. I). What this demonstrates is that, as tough economic times set in, Joseph independently saw fit to impose austerity measures and to keep his lenders informed of his actions.

the legality of this action. *Id.* at 170-71; Joseph Dep., Vol. III at 106. Although the overall share of the two dealerships' revenues received by GMAC actually declined -- from 80 to 90 percent before July to between 75 and 80 percent thereafter, Filler Dep. at 156 -- this phenomenon was, at least in part, a function of continued restrictions GMAC placed on the dealerships' ability to order new cars from the manufacturers and the fact that GMAC required payment from the dealerships by certified check, which imposed an additional expense on the dealerships. Joseph Dep., Vol. II at 15-16, 73-74, Vol. III at 91-93. The moratorium on new car shipments to the dealerships was lifted after a month, but the limits GMAC placed on the dealerships' inventory was so severe that people wondered whether the dealerships were going out of business. *Id.*, Vol. II at 15. Each time one of the dealerships intended to order any new cars, specific permission from GMAC was necessary. *Id.* at 16.

GMAC also made a practice during this period of conducting daily audits at the Joseph dealerships. *Id.*, Vol. I at 179. These audits involved GMAC officials examining not just records of the dealerships' vehicle inventory and their transactions with GMAC, but also of all checks issued by the dealerships. *Id.* at 173-74, 178-79. Because GMAC insisted on payment for all vehicles before releasing them, it became difficult for the dealerships to sell cars with retail financing from sources other than GMAC. *Id.*, Vol. II at 38, 40. GMAC also made a practice of not returning funds due one of the dealerships when, at the end of the day, the audit revealed a balance in the dealership's favor. Hawkins Dep., Vol. I at 44. Instead, these funds would be applied to balances owed to GMAC by one of the other Joseph dealerships. *Id.* at 45.

The actions taken by GMAC at the time it installed a keeper on the dealerships' premises were taken solely to protect GMAC's interests; GMAC officials did not consider it their duty to act

in a manner that would protect the interests of the dealerships' other creditors or even to assure that the dealerships had enough money to stay in business. Yergey Dep. at 357-58; Sanders Dep. at 298.

In August 1991, Joseph's accountant provided him with financial statements of the dealerships for the two-year period ending December 31, 1990. Exh. 17 to Deposition of Clinton Strout ("Strout Dep.") (GMAC's App., Vol. III). According to the financial statement prepared for Joseph Motor Company, the dealership had incurred a net loss of \$272,065 during 1990, and its liabilities exceeded assets by \$156,788. Exh. 5 to Strout Dep. at 14 (GMAC's App., Vol. III). The report therefore expressed "substantial doubt about the Company's ability to continue as a going concern." *Id.* Similarly, the financial statement prepared for Joseph Subaru noted losses of \$411,284 in 1989 and \$266,288 in 1990, stated that as of December 31, 1990 the dealership's assets exceeded its liabilities by \$570,498, and therefore expressed "uncertainty about the Company's ability to continue as a going concern." Exh. 6 to Strout Dep. at 13 (GMAC's App., Vol. III).

d. September 1991: The Workout Agreement

In September 1991, GMAC concluded a written "Workout and Interim Financing Agreement" with Joseph and other members of his family on behalf of themselves and the dealerships. Joseph Dep., Vol. I at 95-97 and Exh. 10 thereto (Tab 84). Attorney Marden represented Joseph during the negotiations leading up to this agreement; Joseph received advice and explanations from Marden as to the terms and implications of the agreement. Marden Dep. at 105-07; Joseph Dep., Vol. I at 89-90, 96-97; Vol. III at 83. Joseph also received advice from a certified public accountant, Clinton Strout, and a personal business adviser, Tom Barton. Marden Dep. at 31-32; Strout Dep. at 28-30, 59. No GM officials were involved in the negotiation of the workout

agreement. Marden Dep. at 165-68; Joseph Dep., Vol. III at 78. However, Joseph wrote to an official at Buick during the negotiations to complain about GMAC's "tactics," particularly the limits GMAC had placed on his ability to acquire more inventory of new cars. Exh. 9 to Joseph Dep. (Tab 78). And the initial draft of the workout agreement itself came from an attorney in the GM legal department. Marden Dep. at 73. In fact, this attorney, Frani B. DeJaco, was involved in the final negotiations with Marden over the specific language in the agreement. Marden Dep. at 110-14 and Exhs. 12-13, 15 thereto (GMAC App., Vol. II). There were also discussions between GM attorney John Bellaver and Elmer C. Sanders, Jr., GMAC's Portland-based assistant control branch manager, about what Sanders agreed at his deposition were "business points to be included in the workout arrangement with Mr. Joseph and his dealerships." Sanders Dep. at 421.

The workout agreement included an acknowledgement by the Joseph family signatories that "there exists no fiduciary relationship or other special or trust relationship" between them and GMAC, and that the obligors would waive certain rights they may have enjoyed as of the date of the agreement.⁶ Exh. 10 to Joseph Dep. at 5-6 (Tab 84). As part of the agreement, Joseph Motor Company, Joseph Subaru and Champion Oldsmobile-GMC Truck, Inc. (the Corinna dealership) each

⁶ The waiver included

all defenses, affirmative defenses, counterclaims, claims, causes of action, setoffs or other rights that [the obligors] may have . . . to contest (i) any events of default under the Lending Documents, whether or not declared by GMAC; (ii) any provisions of the Lending Documents or this Agreement; (iii) the right of GMAC to all rents, issues, profits, and proceeds from any collateral; (iv) the security interest or liens of GMAC in any property (whether real or personal, tangible or intangible), right, or other interest, now or hereafter arising; or (v) the conduct of GMAC in administering credit lines, financing accommodations and loans to the Obligors, in exercising any and all rights under the Lending Documents, or otherwise.

Exh. 10 to Joseph Dep. at 5-6 (Tab 84).

conveyed to GMAC a security interest in the dealership's "general intangibles," including "any and all of [its] rights, title or interest in any Manufacturer Dealer Sales and Service Agreement." Exh. 11 to Joseph Dep. (Tab 85). In other words, GMAC took a security interest in the franchises themselves. Marden Dep. at 83. GMAC presented these provisions to Joseph as non-negotiable. *Id.* at 80-83 and Exh. 6 thereto (GMAC's App., Vol. II). It was the perception of Joseph's attorney that GMAC's position during the workout negotiation was that "as long as Herb Joseph gave up every single legal right he ever had to represent his interests with respect to this transaction, [then] somehow he'd get some cars again." Marden Dep. at 80.

In concluding the workout agreement with Joseph, GMAC did not focus on whether it would be in the best interests of Joseph and his dealerships to remain in business; rather, GMAC agreed to the workout plan because it considered the plan to be in the best interests of GMAC. Caraway Dep. at 326. This was not, however, the way in which control branch manager Caraway presented GMAC's position to Joseph through his attorney. Caraway told Joseph's attorney that his job was to help Joseph sell cars, to keep "old line" dealers like Joseph in business, and to do what he could to see Joseph and his family through the financial crisis. Marden Dep. at 99.

GMAC did not regard the workout agreement as effecting any major change in the actual terms of its lending relationship with Joseph and his dealerships. During negotiations, Caraway wrote his supervisor that "these workout agreements are usually made up of 50% recital, 40% 'if this happens then this happens' and 10% substance with respect to credit lines, additional securities, etc." Exh. 11 to Caraway Dep. at 2 (Tab 81).

Despite the workout agreement, there was considerable sentiment within GMAC that the Joseph dealerships could not survive and bankruptcy was inevitable. *See id.* This view persisted

into the fall of 1991, when Caraway wrote this message about Joseph Motor Company to one of his superiors: “The dealer's prospects are dim, however we should attempt to keep the dealership functioning since it offers the best chance to minimize our risk. The dealer's financial condition has not improved since the workout agreement was signed.” Exh. 15 to Caraway Dep. (Tab 89). Less than a month later, a GMAC credit analyst expressed similar sentiments, in writing, as the analyst recommended against the second six-month payment moratorium granted by GMAC. Exh. 16 to Caraway Dep. at 3 (Tab 90). The control branch manager advised the executive office of GMAC in February 1992 that the only way to keep Joseph's businesses from collapsing would be to work with him to sell the Corinna dealership and to merge Joseph Motor Company with another local GMC dealership. Exh. 17 to Caraway Dep. at 2 (Tab 97). By March 1992 another GMAC employee who analyzed Joseph Motor Company's financial condition concluded, flatly: “The dealership will not survive.” Exh. 18 to Caraway Dep. at 1 (Tab 94); see also Exh. 53 to Sanders Dep. at 2 (Tab 98) (containing February warning by GMAC employee that “we are near the end”). In April, the control branch manager sent a briefing letter to a new supervisor in which he confided that there continued to be no improvement at the Joseph dealerships and, “candidly, we have worked to keep the dealer open during the wintertime to avoid maintaining buildings and grounds, reduce the number of previous model year vehicles, and, hopefully, see some fresh money in the form of an investor or buyer.” Exh. 19 to Caraway Dep. at 2 (Tab 103). As to the possibility of new investors or an outright sale of the dealerships, Caraway was “not optimistic” because he considered Joseph to be “not a savvy car person” who found negotiation difficult and was sentimentally attached to his family business. Exh. 62 to Sanders Dep. at 2 (Tab 105). Another GMAC employee recommended foreclosure in June. Exh. 64 to Sanders Dep. at 8 (Tab 106). Elsewhere Caraway referred to

Joseph's potential efforts to raise additional capital as “futile.” Exh. 11 to Caraway Dep. at 2 (Tab 81).

At the time of the workout agreement and thereafter, GMAC was fully aware, as a result of its ongoing audits of the Joseph dealerships, that significant amounts were owed by the dealerships to their other creditors, including family members, insurance companies, Fleet Bank and the State of Maine, the latter for sales tax. *See, e.g.*, Exh. 13 to Caraway Dep. at 4 (Tab 72) (showing \$1,411,747 owing to creditors, with another \$133,704 owed to the state in sales tax, all as of the end of July 1991, pursuant to GMAC audit completed in September). When Joseph reminded Caraway in the winter of 1992 that his dealerships were \$150,000 in arrears on their sales tax payments, Caraway told Joseph that it is GMAC that furnishes him his inventory and it is therefore more important for Joseph to pay GMAC than the State of Maine. Joseph Dep., Vol. II at 70-71; Exh. 52 to Sanders Dep. (Tab 99).

GMAC recommended that Joseph consolidate his operations by selling the dealerships he had purchased in Corinna and Portland. Joseph Dep., Vol. III at 30-31. Joseph sold his Corinna dealership back to its previous owner in 1991 or 1992. *Id.* at 30. However, GM's Oldsmobile division initially refused to approve this dealership transfer, and during this delay the price the previous owner was willing to pay for the dealership fell by \$100,000. *Id.* at 40. Joseph also sold the Portland dealership in 1992 and transferred its debts to Joseph Motor Company. *Id.* at 21, 24-27.

e. August 1992: The Bankruptcy

Joseph worked to keep his remaining dealerships in business until August 11, 1992, the date on which Joseph Motor Company and Joseph Subaru filed Chapter 11 bankruptcy petitions. Joseph Dep., Vol. I at 119-20; Exh. 3 to Marden Dep. at 3 (Tab 116). Among these efforts were discussions with another automobile dealer about a sale of the Joseph dealerships. Joseph Dep., Vol. III at 126. Joseph sought additional investors for the dealerships. *Id.* at 67, 111-12, 148-49, 151. He retained an outside firm, Decision Development Group, in an effort to raise capital and restructure the businesses. *Id.* at 149-51. During this period, the dealerships made an effort to pay their trade creditors on a C.O.D. basis. *Id.* at 129. Some of these creditors, however, went unpaid. *Id.*, Vol. I at 104. GMAC continued to provide floor plan financing through the date of the bankruptcy filing. Sanders Dep. at 348.

The event that triggered the bankruptcy filing was the decision by the Maine Bureau of Taxation to revoke the dealerships' sales tax license. Exh. 3 to Marden Dep. at 3 (Tab 116). Joseph continued his efforts to sell his dealerships following the bankruptcy filing, and actually negotiated a purchase and sale agreement with an Augusta, Maine GM dealer named Jim Davis. Marden Dep. at 179; Joseph Dep., Vol. II at 9-10. The agreement was contingent on the receipt of GMAC financing by Davis. *Id.*, Vol. III at 113. Davis intended to operate the business at its existing Waterville location. *Id.* at 122. Joseph sent GM's Oldsmobile division a copy of the buy-sell agreement he had reached with Davis. *Id.* at 112. Despite initial indications from GMAC that it would look favorably on the Davis proposal, the company ultimately rejected his bid for financing and the deal collapsed. *Id.* at 113; Marden Dep. at 180-83. Thereafter, GM approved a plan by Davis to purchase the Chevrolet dealership that was operating elsewhere in Waterville. Smith Dep. at 196; Joseph Dep., Vol. II at 10.

III. Sufficiency of the RICO Allegations in the Complaint Against GM

In its motion to dismiss, GM contends that the plaintiff is not entitled to relief on its RICO claims because they do not allege the requisite predicate acts with sufficient particularity as required by Fed. R. Civ. P. 9(b), because the plaintiff lacks standing to bring RICO claims, and because the claims do not sufficiently allege a RICO conspiracy or a pattern of racketeering activity. To evaluate these contentions, I look only to the allegations in the complaint itself, accepting the well-pleaded facts as true and drawing any reasonable inferences in favor of the plaintiff. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41, 43 (1st Cir. 1991).

The plaintiff asserts six distinct RICO claims. Count XVIII alleges a violation of 18 U.S.C. § 1962(a), which in relevant part provides that it is

unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Count XVIII alleges that GM and GMAC constitute an “enterprise” within the meaning of section 1962(a), and that they derived income from a pattern of racketeering activity that included bankruptcy fraud and the intentional use of the U.S. mails and/or interstate wire communications. Complaint ¶¶ 223-26. Count XIX asserts a violation of section 1962(b), which declares in relevant part that it is “unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” Count XIX alleges that GM and GMAC acquired an interest in and/or control of Joseph Motor Company and Joseph Subaru through

a pattern of racketeering activity. *Id.* at ¶ 237. Count XX asserts a violation of section 1962(c), which in relevant part declares that it is unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity” It is alleged in Count XX that Joseph Motor Company and Joseph Subaru are an enterprise within the meaning of section 1962(c), and that GM and GMAC conducted and/or participated in the activities of the enterprise through a pattern of racketeering activity. *Id.* at ¶¶ 249, 251. Finally, Counts XXI to XXIII allege, with reference to the wrongful acts asserted in the previous three RICO counts, that GM and GMAC engaged in a conspiracy to commit RICO violations, itself a violation of RICO pursuant to section 1962(d).

GM's contention that the plaintiff lacks standing to bring the RICO claims is easily addressed. Creditors of a bankrupt corporation generally do not have standing to sue under the civil RICO provisions. *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2d Cir. 1993), *cert. denied*, 13 L. Ed. 2d 206 (1994). This is because “[t]he creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations.” *Id.* The plaintiff here, however, is not a creditor of the bankrupt dealerships but a committee of creditors with specific authority from the Bankruptcy Court to pursue these claims as assignee of the bankruptcy estate of the dealerships. See Complaint ¶ 2; GMAC Answer ¶ 2; GM Answer ¶ 2. As such, the plaintiff stands in the shoes of the two dealerships that were allegedly injured by racketeering activities of the defendants.

GM next contends that it is entitled to dismissal of all the RICO claims against it because the plaintiff has failed to plead the alleged acts of fraud with the particularity required by Fed. R. Civ.

P. 9(b). It is well established in this circuit that this heightened pleading requirement applies in cases alleging mail and wire fraud pursuant to RICO. *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 (1st Cir. 1991). There is no reason to suppose that the requirement does not apply when the allegations embrace bankruptcy fraud as well. “As in any other fraud case, the pleader is required to go beyond a showing of fraud and state the time, place and content of the alleged . . . communications perpetrating that fraud.” *Id.* (citation and internal quotation marks omitted); *see also Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994); *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987).

The plaintiff responds that it has adequately pleaded its RICO allegations, citing case law noting that RICO liability requires two or more predicate acts that are related to one another and either amount to or pose a threat of continued criminal activity. This begs the question of whether the plaintiff has complied with Rule 9(b). The predicate acts cited in the complaint involve fraud, and must themselves be pleaded with particularity before the court may even analyze whether the acts are sufficiently suggestive of a pattern of racketeering activity.

In analyzing whether the defendant had met the particularity requirement, it is especially noteworthy that the court finds itself analyzing the plaintiff's Second Amended Complaint, signed on October 28, 1994 -- more than six months after the commencement of this action in April 1994. Discovery was well under way at the time of the drafting of the Second Amended Complaint. The court originally established a discovery deadline of October 31, 1994, *see* Scheduling Order (Docket No. 21), but later extended it to January 31, 1995, *see* Amended Scheduling Order (Docket No. 42). The plaintiff initially asserted its RICO claims in its First Amended Complaint, dated May 27, 1994 and filed with the court four days later. *See* First Amended Complaint (Docket No. 8). A review

of the allegations material to the RICO claims in the First Amended Complaint reveals that they are nearly identical to, and certainly pleaded with the same degree of particularity as, the allegations in the Second Amended Complaint. The plaintiff chose not to redraft its RICO claims in any significant manner, although GM had filed its motion to dismiss in June and, thus, the plaintiff was on notice that the sufficiency of its pleadings was under attack.

I make these observations because the First Circuit, in both *Feinstein* and *Becher*, was careful to temper its application of Rule 9(b) in the RICO context by pointing out that in certain circumstances a plaintiff submitting an insufficiently pleaded RICO complaint should be given an opportunity to conduct additional discovery and submit an amended complaint. *See Feinstein*, 942 F.2d at 43, citing *Becher*, 829 F.2d at 290. This is so in light of “the apparent difficulties in specifically pleading mail and wire fraud as predicate acts.” *Id.* at 290. “[W]here the plaintiff was not directly involved in the alleged transaction[s], the burden on the plaintiff to know exactly when the defendants called each other or corresponded with each other, and the contents thereof, is not realistic.” *Id.* at 291. Thus, because the plaintiff in *Becher*

provided an outline of the general scheme to defraud and established an inference that the mail or wires was used to transact this scheme[,] requiring the plaintiff to plead the time, place and contents of communications between the defendants, without allowing some discovery, in addition to interrogatories, seems unreasonable.

Id. Unlike *Becher*, this is not a case in which the plaintiff was thwarted in its efforts to conduct discovery on its RICO claims, or in which requests to amend the complaint met with any resistance. Accordingly, either the Second Amended Complaint suffices or it does not.

I conclude that it does not, at least insofar as the complaint seeks to implicate GM. The allegations in the complaint involving GM can only be described as both sparse and vague. After

outlining a series of allegedly wrongful acts by GMAC, the section of the complaint presenting allegations common to all claims avers that

GMAC undertook the above-referenced actions both on its own behalf and as an agent of GM. On information and belief, GM was aware of, deliberated on, consented to and participated in GMAC's control and domination of Debtors' businesses, including the financing[,] inventory and operating constraints placed on Debtors' businesses by GMAC. These deliberations and discussions between employee[s] in GM's and GMAC's Detroit, Michigan; New York, New York; and South Portland, Maine offices occurred from July 1991 through the Debtors['] bankruptcy cases via written, mailed reports, memos, correspondence and via telephone communications.

Complaint ¶ 82. It is also alleged that for the 18 months preceding the bankruptcy filings, “GM and GMAC made misrepresentations to, withheld material information from and held out false hopes to the Debtors, Mr. Joseph and the unsecured creditors that the dealerships were in business, could survive and satisfy creditors.” *Id.*, ¶ 91. The allegations in the RICO claims themselves are equally vague. It is alleged that “during August and September of 1991, through the means of telephone conversations and communications by mail by and among GM and GMAC employee[s], GM and GMAC formulated a plan to take complete control of the Debtors['] business for their sole benefit” *Id.*, ¶ 227(f). After accusing two GMAC employees of making certain false representations to Joseph, the complaint asserts that these communications “facilitated GMAC's and GM's continuing improper receipt of substantially all of the Debtors' revenues.” *Id.* The complaint then alleges that

between September of 1991 and September of 1992, through the means of telephone conversations and communications by mail, Mr. Joseph inquired of GM officials in Detroit whether GM intended to put the Debtors out of business, given their operating restrictions, and GM officials falsely informed Mr. Joseph that GM and GMAC wanted to assist and support the Debtors and did not want to shut them down. In fact, GM and GMAC had formulated a plan to prop up the Debtors' insolvent dealerships and pull out virtually all revenues for GMAC's and GM's benefit and to the direct detriment of the Debtors and their other unsecured creditors.

Id., ¶ 227(h). It is alleged that between July 1991 and August 1992,

on a regular basis, GMAC wrongfully intercepted checks from GM representing open account payments of \$20,000 to \$30,000 per month to Joseph Motor for warranty work, servicing, rebates and dealer hold-back payments, and applied the vast majority of these open account payments against Joseph's notes and the Wholesale Agreement. GM mailed these open account payments owed to Joseph Motors directly to GMAC with knowledge that GMAC wrongfully endorsed the checks to its own accounts, pursuant to the fraudulent scheme noted above.

Id., ¶ 227(i). Finally, “on information and belief,” it is alleged that GMAC and GM engaged in similar activities involving three unrelated dealerships in Maine, a Florida dealership and other unspecified dealers in other states during the past ten years. *Id.*, ¶¶ 228-30. Only the allegation that GM wrongfully mailed certain checks to GMAC can be understood as stating with any particularity the time, place and content of the communications constituting the RICO violation. But, as the complaint makes clear, it is not alleged that these actions themselves were fraudulent but were, rather, taken pursuant to a “fraudulent scheme.” And, as to GM's role in the hatching of the allegedly fraudulent scheme, the complaint is devoid of the required details. Accordingly, GM is entitled to dismissal of the RICO claims against it.⁷

IV. Standing of the Plaintiff to Pursue Certain Claims

Another threshold issue requires the court's attention, this one raised by GM in its summary judgment motion. GM contends that the plaintiff, as a committee of unsecured creditors appointed

⁷ I also agree with GM that the three RICO counts alleging a conspiracy are “alleged in wholly conclusory terms” and therefore cannot withstand a motion to dismiss. *Miranda*, 948 F.2d at 48. Thus, even if the plaintiff had sufficiently alleged predicate acts, the complaint fails because it lacks “details of the alleged conspiracy.” *Id.* The “bare assertion that Defendants conspired to violate RICO is insufficient to state a claim for RICO conspiracy. Plaintiffs must also make factual allegations respecting the material elements of the offense, including the element of an agreement to violate RICO.” *Gott v. Simpson*, 745 F. Supp. 765, 772 (D. Me. 1990).

pursuant to section 1102 of the Bankruptcy Code, lacks standing to pursue claims on behalf of individual creditors. According to GM, the plaintiff cannot recover anything in connection with its claim that the defendants breached fiduciary duties to the dealerships' creditors (Count III) and its claim of intentional interference with contractual relations (Count X). GM also takes the position that certain damages asserted by the plaintiff in connection with other claims are also not recoverable by the unsecured creditors' committee because they are damages that could only be recovered by individual creditors pressing independent claims against the bankruptcy estate.

The powers and duties of an unsecured creditors committee appointed in connection with a Chapter 11 bankruptcy reorganization proceeding are set forth in 11 U.S.C. § 1103. In relevant part, such a committee is empowered to

- (1) consult with the trustee or debtor in possession concerning the administration of the case;
- (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
- (4) request the appointment of a trustee or examiner under section 1104 of this title; and
- (5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c). Such a committee's authority to litigate is derived from the “other services” provision of subsection (c)(5), and requires leave of the Bankruptcy Court. *In re STN Enters.*, 779 F.2d 901, 904 (2d Cir. 1985). Such leave has been granted here.

In such circumstances, the creditors committee is pinch-hitting for the debtor itself and/or a bankruptcy trustee. *See* B. Weintraub & A. Resnick, *Bankruptcy Law Manual* (1986) at 8-63 (noting that litigation by creditors committees is appropriate where the debtor-in-possession is unwilling or unable to litigate directly). Accordingly, I agree with GM that the case law delineating which types of claims a bankruptcy trustee has standing to pursue should also govern the question of when a creditors committee has standing to litigate.

The Seventh Circuit distinguishes between “general” claims, which the trustee may pursue, and “personal” claims, which may be asserted only by individual creditors. *See Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994); *Koch Refining v. Farmers Union Central Exch., Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988); *see also In re Aluminum Mills Corp.*, 132 B.R. 869, 884 (Bankr. N.D. Ill. 1991); *Begier v. Price Waterhouse*, 81 B.R. 303, 305 (E.D.Pa. 1987). “A cause of action is ‘personal’ if the claimant himself is harmed and no other claimant or creditor has an interest in the cause.” *Koch Refining*, 831 F.2d at 1348.

The point is simply that the trustee is confined to enforcing entitlements of the [debtor]. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the [debtor] . . . [T]here is a difference between a creditor's interest in the claims of the [debtor] against a third party, which are enforced by the trustee, and the creditor's own direct -- not derivative -- claim against the third party, which only the creditor himself can enforce.

Steinberg, 40 F.3d at 893. I find this analysis persuasive, and further conclude that it bars the plaintiff from asserting the intentional interference with contract claim as well as the claim that the defendants breached a fiduciary duty to the creditors of the debtors. Even if more than one creditor -- or, indeed, an entire class of creditors -- could assert such claims, they are still personal in nature and not within the purview of the creditors committee. *See In re Continental Airlines, Inc.*, 57 B.R. 839, 841 (Bankr. S.D. Tex. 1985) (creditors committee may not assert “class action”-type claim on

behalf of creditors).⁸ The plaintiff's specific claim for sales tax liability is likewise a claim that is personal to the state of Maine and therefore not a proper one for the plaintiff to pursue.⁹

V. The Plaintiff's Fraud Allegations

Having disposed of these preliminary issues, I now turn to the substance of the defendants' contentions that the undisputed facts in this proceeding support judgment in their favor as a matter of law on all remaining claims. Ground zero of this dispute is the plaintiff's contention that GM and GMAC defrauded the dealerships by saying one thing, *i.e.*, that they would do their best to preserve these dealerships and Joseph's GM franchises, while doing another, *i.e.*, seeking to precipitate the demise of the dealerships in a manner that would limit the defendants' financial exposure and further GM's "Project 2000" plan to eliminate one of the three Waterville-based GM dealerships. Both defendants contend that the summary judgment record entitles them to a finding of no fraud, and that many of the plaintiff's claims fail as a result.

In Maine, the elements of common-law fraud are

⁸ The plaintiff has caused to be filed affidavits assigning to the plaintiff the claims of 13 individual creditors. *See* Docket Nos. 90-102. Both defendants have moved for leave to file a motion striking these assignments. *See* Docket Nos. 105-06, 108-09. I regard these motions as moot in light of my determination that the plaintiff is without standing to maintain claims on behalf of individual creditors. *See Williams v. California 1st Bank*, 859 F.2d 664, 666 (9th Cir. 1988) (assignment of individual claims to bankruptcy trustee did not confer standing on trustee to pursue claims).

⁹ GM raises two other issues of general applicability. It devotes considerable attention in its brief to the contention that the court may not pierce the corporate veil and find GM liable for the acts of GMAC. Although the plaintiff declines to concede the issue, it is clear that none of the plaintiff's theories of liability rely on corporate veil piercing, and accordingly I do not address the issue. GM also contends that it cannot be held liable for acts of GMAC because GMAC was not its agent. This theory does have applicability to certain of the plaintiff's claims but not others, and I therefore address the issue *seriatim*.

(1) a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to [the plaintiff's] damage.

F.D.I.C. v. S. Praver & Co., 829 F. Supp. 439, 445 (D. Me. 1993); accord *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992). Maine law also provides that a party is liable for negligent misrepresentation “if in the course of [its] business [it] supplies false information for the guidance of others in their business transactions, and the other party justifiably relies upon it to [its] pecuniary detriment.” *Id.* Thus, false representation is an element common to both fraud and negligent misrepresentation. *Id.* And “no actionable fraud claim can arise absent an active concealment or a duty arising from a confidential or fiduciary relationship.” *Guiggey*, 615 A.2d at 1173.

GM takes the position that it never made any false statement of material fact upon which the debtors could reasonably have relied. GMAC contends that any statements it made to the debtors were either true or merely expressions of opinion that are not actionable because they are not statements of fact, and that the record establishes a lack of reliance on any statements it made. The plaintiff takes the opposite view, further contending that GMAC had fiduciary obligations to the debtors and that GM is liable for GMAC's statements because GMAC was GM's agent.

There is no shortage of evidence in the record that various individual employees of GMAC came to believe, prior to consummation of the workout agreement, that Joseph Motor Company and Joseph Subaru could not survive their financial crisis. The record also demonstrates that these officials held this view emphatically, and put it in writing so that others in the company would have the benefit of their warning. I further believe that a factfinder could reasonably infer from this evidence that GMAC as a whole believed these dealerships were facing certain financial ruin. I agree with GMAC, however, that to the extent it held this belief it was not a material fact but rather

an opinion about events likely to occur in the future. Thus, GMAC's opinion of the dealerships' prospects is not a “fact” for purposes of fraud under Maine law. *See Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58, 65 (1st Cir. 1992). The only exception is when the relationship of the parties is such that circumstances justify the reliance by one on the opinions of the other. *See Wildes v. Pens Unlimited Co.*, 389 A.2d 837, 840 (Me. 1978) (opinion actionable as fraud because plaintiff “at the mercy of the defendant”). No such circumstances existed here; Joseph was an experienced car dealer who had the benefit of accounting, business and legal advice and, presumably, access to the relevant financial and sales data from the dealerships. Moreover, absent from the record is anything from which a factfinder could conclude that GMAC ever actually misrepresented to Joseph or anyone else at the dealerships GMAC's views about the longterm viability of the debtors. At most, GMAC can be understood to have advised Joseph that it would do what it could to see the dealerships through their crisis. If anything, such representations are fully consistent with a view that the dealerships were financially doomed and that the best way out of the mess for all concerned would be for Joseph to sell his businesses to another dealer or dealers.

Nor do I find any obligation on the part of GMAC to disclose to the debtors the “fact” that GMAC, or at least some of its employees, held pessimistic views about the dealerships' future. The Law Court has never held that a creditor-debtor relationship is a fiduciary one or otherwise includes any affirmative duty to disclose information. *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250 (Me. 1992) (no fiduciary duties where “[n]othing suggests that a greater relationship existed” between debtor and creditor); *see also Campbell v. Machias Sav. Bank*, 865 F. Supp. 26, 37 (D. Me. 1994). Of course, GMAC was not just a major creditor of the dealerships; it was a secured creditor that acted in a highly aggressive manner to protect its security interest in the

dealerships' vehicle inventories. But, contrary to the assertion of the plaintiff, nothing in the record suggests that Joseph “placed [his] trust in [a creditor financial institution's] superior knowledge” when making an important business decision, *Morris v. Resolution Trust Corp.*, 622 A.2d 708, 712 (Me. 1993), or that the nature of the relationship was such that the court could infer the existence of a partnership between GMAC and the dealerships, thus creating fiduciary obligations, *Dalton v. Austin*, 432 A.2d 774, 777 (Me. 1981). Under Maine law, “[a] good working relationship between two parties . . . is not sufficient evidence for a finding of the existence of the special legal obligations of a confidential relation.” *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9, 17 (1st Cir. 1987). All the more so here, where relations between GMAC and the dealerships were at best strained once GMAC installed its “keeper” at the dealerships.

I conclude that GMAC did not commit fraud against the debtors as a matter of Maine law.¹⁰ Accordingly, it is not necessary to take up the plaintiff's contention that GMAC acted as GM's agent. The plaintiff further contends, however, that GM itself made false statements to the debtors that amount to actionable fraud. In its memorandum of law, the plaintiff does not specify which statements made by GM meet the definition of fraud. The record reflects that the only GM official involved in the workout negotiations was a staff attorney; to the extent that she was not simply representing GMAC on this occasion, the record reflects that she engaged in arm's length discussions with counsel for the debtors and made no misrepresentations. Other than that, the only GM statements reflected in the record are the 1988 prediction that the Portland Buick dealership would sell 825 new cars per year, and the assurance two years later from GM executive Ogden that Joseph

¹⁰ The plaintiff also contends that the defendants defrauded the unsecured creditors of the dealerships. I address these contentions in my discussion of the issues arising under the Bankruptcy Code, *infra*.

should place his trust in GMAC because it would “be there” for him. The former is precisely the kind of opinion statement that the First Circuit determined in *Schott Motorcycle Supply* is not actionable as fraud under Maine law. The latter also carries the aura of an opinion that was delivered in the context of a sales pitch; Ogden, after all, was seeking to persuade Joseph that henceforth he should use a GM subsidiary as his major lender. While the record amply reflects the fact that Joseph reposed special trust in the advice of GM, this is an insufficient basis from which to infer the existence of a fiduciary relationship. Accordingly, in the absence of anything to suggest that Ogden was actively concealing relevant information from the dealerships, his statement cannot serve as the basis for a fraud claim. And, in the absence of anything from which a factfinder could conclude that either defendant made false representations, the plaintiff’s claim for negligent misrepresentation also fails.¹¹

VI. The RICO Claims on Their Merits

GMAC also contends that the lack of deception is also fatal to the plaintiff’s RICO claims. In the circumstances of this case, this issue becomes central because the plaintiff must establish at least two “predicate acts” of “racketeering activity” as that term is defined in 18 U.S.C. § 1961; such activity consists of certain specified state or federal crimes including mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343 as well as “any offense involving fraud connected with a case under [the Bankruptcy Code].” 18 U.S.C. § 1961(1); *McEvoy Travel*

¹¹ I regard my finding that the defendants owed no fiduciary duties to the debtors as dispositive of the plaintiff’s separate claim (Count II of its complaint) that the defendant breached such a duty.

Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 790-91 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990).

Although conceding that the scope of actionable fraud under RICO is broader than that of common-law fraud, GMAC maintains that the record supports a finding that it engaged in no scheme to deceive the dealerships and that GMAC is accordingly entitled to judgment on the RICO claims. The plaintiff contends that the record suggests the defendants engaged in “a program of misrepresentations and steps to conceal their conduct and true intentions” sufficient to create RICO liability. Plaintiff’s Objection to General Motors Acceptance Corporation’s Motion for Summary Judgment (Plaintiff’s Objection to GMAC Motion”) (Docket No. 84) at 33-34. The plaintiff avers that the basis of its mail and wire fraud claims pursuant to RICO is its contention that GMAC, with the assistance of GM, “clearly attempted to collect as much money as possible to pay down their undercollateralized loans before a bankruptcy filing or other creditor sued to collect their debts.” *Id.* at 33. GMAC bases its RICO bankruptcy fraud claim on its allegation that GMAC knowingly and fraudulently transferred property of the debtors in a manner intended to defeat the provisions of the Bankruptcy Code. Complaint ¶¶ 238-39.

The sense in which RICO fraud is broader than common-law fraud, according to the First Circuit, is that “no misrepresentation of fact is required in order to establish a scheme to defraud” within the meaning of RICO. *McEvoy Travel Bureau*, 904 F.2d at 791. “However, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud. . . . Rather, the scheme must be intended to *deceive* another, by means of false or fraudulent pretenses, representations, promises or other deceptive conduct.” *Id.* (emphasis in original). To illustrate, the First Circuit cited the Webster’s Dictionary definition of “defraud”: “to

take or withhold from (one) some possession, right or interest by calculated misstatement or perversion of truth, trickery, or other deception.” *Id.* at 792 (emphasis and citation omitted); *see also Lavery v. Kearns*, 792 F. Supp. 847, 861-62 (D. Me. 1992).

Viewing the record in the light most favorable to the plaintiff, what the defendants did not disclose to either Joseph or the dealerships was GMAC's belief that the dealerships could not survive financially at the time of the workout agreement and thereafter. GM did not disclose that, pursuant to its Project 2000 plan, it hoped to reduce the number of GM dealerships in Waterville by one and that there had been a determination that Joseph Motor Company's physical location was unfavorable. For the purposes of summary judgment analysis, I believe it is appropriate for the court to infer from this that GM had determined, but did not disclose to the debtors, that it no longer desired to have Joseph or Joseph Motor Company as a franchisee.

The plaintiff does not identify, and I am not able to discern, what right or interest the defendants could have intended to deprive the debtors of by virtue of not disclosing to them the information described above. I know of no legal principle that requires a creditor to disclose to a debtor its opinion of the debtor's creditworthiness or general business viability -- either in the context of workout negotiations or otherwise. Similarly, I am not aware that a franchisor like GM has any obligation to disclose to a franchisee that it does not plan to perpetuate even a longstanding franchising relationship. The record supports the inference that the defendants abandoned any sense of loyalty to these longstanding dealerships, jumping from these sinking ships and taking with them

all that they might carry as creditors.¹² The scope of mail and wire fraud is broad, but not so broad as that.

The plaintiff's contention that the defendants committed predicate acts of bankruptcy fraud presents a different problem. In this context, the plaintiff makes no real effort to resist GMAC's contention that the plaintiff has failed to come forward with any evidence of bankruptcy fraud.¹³ Instead, the plaintiff asks the court to excuse this failure and order further discovery. The plaintiff contends that it was precluded from fully discovering the bankruptcy fraud by a ruling of this court that such discovery would be precluded pending the outcome of the defendants' motions to dismiss the complaint, including the RICO counts. This is not an accurate characterization of the record. On June 9, 1994 the court entered an order specifically providing that “discovery shall *not* be stayed,” but enjoining the parties from bringing discovery disputes before the court until the court ruled on either the pending motions to dismiss or a then-pending motion to withdraw the reference of a parallel proceeding to the Bankruptcy Court. Order (Docket No. 12) at 2 (emphasis added). The purpose of this ruling was to avoid the possibility of inconsistent discovery rulings on the same issue. The court explicitly advised the parties that if the motion to withdraw the reference were granted, it would again entertain discovery disputes. *Id.* This is precisely what occurred on June 30, 1994,

¹² Of course, the record also supports another inference, less than favorable to the plaintiff, that the defendants acted with forbearance in keeping these dealerships in business long after they had concluded it was futile to do so, in the vain hope that Joseph would somehow pull through, perhaps out of loyalty to a GM dealer of such long standing.

¹³ The plaintiff's only substantive response is to contend that “GMAC witnesses essentially admit” that they knowingly and fraudulently transferred property with the intent to defeat the provisions of the Bankruptcy Code. *See* Plaintiff's Objection to GMAC Motion at 34. In fact, all that GMAC's witnesses admit to is that they were aware that bankruptcy was inevitable.

see Docket No. 20 (order granting plaintiff's motion to withdraw reference), and the plaintiff has not been proscribed from conducting otherwise proper discovery on any of its RICO claims.

I have already determined that GM is entitled to dismissal of the RICO claims because the plaintiff has failed to plead these claims with the requisite particularity. I conclude here that GMAC is entitled to summary judgment in its favor on the RICO claims because the record lacks any evidence of predicate acts; in the event the court does not adopt my recommendation as to dismissal of the RICO claims against GM, I further conclude that GM is entitled to summary judgment in its favor on these claims for the same reason GMAC is so entitled.

VII. Claims Pursuant to Federal and State Automobile Dealer Statutes

The plaintiff seeks relief against both defendants pursuant to the Automobile Dealers Day in Court Act (“Dealer Act”), 15 U.S.C. § 1221 *et seq.*, and the analogous Maine statute, 10 M.R.S.A. § 1171 *et seq.* GM contends that it is entitled to summary judgment on the Dealer Act claim because it did not act in bad faith and did not terminate the debtors' GM franchises. GMAC contends it is entitled to summary judgment on this claim because it did not dominate or control the debtors. Although GMAC does not directly raise the argument that it is not subject to Dealer Act liability because it is not an automobile manufacturer, it does contend generally that it is not an agent of GM for any purposes connected with this litigation.

Section 1222 of the Dealer Act authorizes an automobile dealer to bring suit against any automobile manufacturer to vindicate that manufacturer's failure “to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer[.]” 15 U.S.C. § 1222. The Act defines “good faith” as

the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1221(e) (emphasis in original). In its complaint, the plaintiff alleges that the defendants breached this statutory duty of good faith specifically by

their conduct in controlling the Debtor's [sic] dealerships and preventing the Debtors from properly operating their businesses, secretly liquidating the Debtors by continued vehicle sales while in control of the businesses, putting the Debtors at a competitive disadvantage, misleading the unsecured creditors, preventing the Debtors from making payments on sales tax obligations and payments to other third party unsecured creditors and by effectively terminating these dealership franchise arrangements through their actions. GM and GMAC effected these steps pursuant to wrongful demands on Debtors and Mr. Joseph to undertake or not undertake certain steps, including non-payment of sales taxes.¹⁴

Complaint ¶ 206.

The Dealer Act defines “automobile manufacturer” as an entity that manufactures automobiles in the traditional sense, but also explicitly includes “any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.” 15 U.S.C. § 1221(a). In *General Motors Acceptance Corp. v. Marlar*, 761 F.2d 1517 (11th Cir.), *vacated after settlement*, 774 F.2d 1042 (1985), the Eleventh Circuit relied on this language to conclude, following a jury trial, that “[s]ufficient credible evidence was submitted that GMAC through its activities in assisting the sale

¹⁴ GM seeks to recharacterize the plaintiff's Dealer Act claim as one that would seek to sanction the defendants for *continuing*, rather than terminating, the debtors' franchises. GM further contends that the plaintiff has not stated a cause of action under the Dealer Act because the defendants never terminated the applicable GM franchises. Plainly, however, the Dealer Act enjoins more than just wrongful termination. It also enjoins the failure to act in good faith within the context of a dealer-manufacturer franchise relationship. The plaintiff states a cause of action for such a failure -- not by alleging that the defendants opted against terminating, but by taking certain other actions while holding at least the implicit threat of termination over Joseph's head.

of automobiles by financing of dealerships and products served as an agent of the franchiser” and was therefore subject to Dealer Act liability. *Id.* at 1521. Similarly, on the present record I am not prepared to conclude that GMAC was not the agent of GM, at least for purposes of the Dealer Act. A reasonable reading of the summary judgment record would support a finding that GMAC made decisions on extending or denying credit to the debtors based on directions received from GM.¹⁵

Neither does the present record permit me to conclude that the defendants are entitled to a judgment as a matter of law on the substance of the Dealer Act claim. The First Circuit has adopted a narrow reading of the cause of action created by the Dealer Act, requiring the plaintiff to make a showing of “actual or threatened coercion or intimidation.” *General GMC, Inc. v. Volvo White Truck Corp.*, 918 F.2d 306, 308 (1st Cir. 1990) (internal quotation marks and citation omitted). A further requirement is that “the coercion or intimidation must include a wrongful demand that would result in penalties or sanctions if not complied with.” *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1056 (1st Cir. 1985); *see also H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987, 991 (1st Cir. 1986) (plaintiff may not meet this requirement merely by attaching adjectives like “coercive,” “discriminatory” and “unreasonable” to description of defendant’s actions); *C-B Kenworth, Inc. v. General Motors Corp.*, 706 F. Supp. 952, 954 (D. Me. 1988).

The defendants place special reliance on *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986), a case in which the plaintiff bankruptcy trustee based his claim of intimidation and

¹⁵ At least one other circuit has held that, given the remedial purposes of the Dealer Act, wholly-owned financing subsidiaries like GMAC always qualify as manufacturers within the meaning of the statute, even if the record does not support a finding of agency. *See Colonial Ford, Inc. v. Ford Motor Co.*, 592 F.2d 1126, 1129 (10th Cir.), *cert. denied*, 444 U.S. 837 (1979). First Circuit case law counsels against such an approach. *See Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 441 (1st Cir.) (noting that “the provision in question should be interpreted in the context of general agency law”), *cert. denied*, 385 U.S. 919 (1966).

coercion on allegations that are similar to those of the present case: that the manufacturer decided to suspend the dealer's credit during a particularly bad time for the automobile industry in general, placed a keeper on the dealership premises, and conducted frequent audits of the dealership, which had sold vehicles out of trust. *Id.* at 393, 397. The court granted summary judgment to the defendants, concluding that the plaintiff's theory "has the shrill ring of the cry of a child who has been caught with his hand in the cookie jar yet resents his mother's decision to place the jar out of reach." *Id.* at 397. *Stamps* might compel a similar result here, if the record did not suggest that the defendants did more than just move the cookie jar. During the workout negotiations, GMAC played hardball and obtained both a sweeping release of any claims the debtors might have had against GMAC to date and a security interest in the franchising agreements themselves -- the lifeblood of these businesses. It may be that these were the reasonable actions of a creditor acting to preserve its interests. But it may also be that these actions constitute the kind of wrongful demand enjoined by the Dealer Act. This is a matter for the factfinder at trial. *See C-B Kenworth*, 706 F. Supp. at 954-55 (factual dispute generated pursuant to Dealer Act over defendant's demand of general release from dealer and defendant's refusal to provide certain assistance to dealer).

For similar reasons, the defendants are also not entitled to summary judgment on the plaintiff's claim pursuant to Maine's auto dealer statute. This statute makes it unlawful, *inter alia*, for an automobile manufacturer or an agent thereof¹⁶ to prevent or attempt to prevent a dealer from

¹⁶ The Maine statute defines "manufacturer," in relevant part, as

any person, partnership, firm, association, corporation or trust, resident or nonresident, who manufactures or assembles new motor vehicles, or imports for distribution through distributors of motor vehicles, or any partnership, firm, association, joint venture, corporation or trust, resident or nonresident, which is controlled by the manufacturer.

(continued...)

changing the capital structure of a dealership, subject to agreed-upon “reasonable capital standards,” and enjoins a manufacturer from obtaining anything of value on account of a dealership's transactions with third parties unless the benefit is accounted for and transmitted to the dealer. 10 M.R.S.A. § 1174(3)(H) and (J). The statute also broadly enjoins an automobile manufacturer from engaging in any action that is “arbitrary, in bad faith or unconscionable” and causes damage, *inter alia*, to either a dealer or to the public. *Id.* at subsection (1). And the statute prohibits a manufacturer from imposing “unreasonable restrictions,” either directly or indirectly, on a dealer

relative to transfer, sale, right to renew, termination, discipline, noncompetition covenants, site-contract whether by sublease, collateral pledge of lease, or otherwise, right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal or equitable rights.

10 M.R.S.A. § 1177.

In *Schott*, the First Circuit found summary judgment in favor of a motorcycle manufacturer to be appropriate where the plaintiff had made no showing under the Maine dealer statute that the defendant's conduct was arbitrary, in bad faith, unconscionable or commercially unreasonable. *See Schott*, 976 F.2d at 63. The basis of the plaintiff's claim was that the manufacturer failed to follow through on a stated commitment to the motorcycle business generally, and took certain coercive actions in 1986. *Id.* at 60, 64. The court rejected the contention that alleged actions in 1986 could have coerced a dealer to enter into a franchising agreement actually signed in 1985. *Id.* at 64. Here,

¹⁶(...continued)

10 M.R.S.A. § 1171(10). GMAC does not contend that it is not a manufacturer for purposes of this statute, or that it is otherwise not subject to the provisions of section 1174(3). By its terms, this subsection is applicable to any “[m]anufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent or other representative thereof[.]” 10 M.R.S.A. § 1174(3). To the extent that such an argument is implicit in GMAC's contention that it was neither an agent of GM nor controlled by it, I reject it for the same reasons articulated in connection with the federal Dealer Act.

by contrast, the defendants' actions go beyond that which was alleged in *Schott*. As I noted in connection with the Dealer Act claim, the negotiating position adopted by the defendants in connection with the workout agreement may either have been reasonable or coercive. There is also the added wrinkle of GMAC taking payments made by the dealership's retail customers and keeping them in their entirety, even when some of these funds were paid by the customers as state sales taxes. I agree with the plaintiff that these payments raise a factual issue relating to potential liability under subsection (3)(J).

VIII. The Claims of “Breach of Duty of Good Faith and Fair Dealing,” Common-Law Conspiracy, Breach of Contract and Common-Law Conversion

The defendants further contend that they are entitled to summary judgment in their favor on the plaintiff's claims of breach of the duty of good faith and fair dealing (Count IV), common-law conspiracy (Count XXIV), breach of contract (Count V) and common-law conversion (Count XIII).

GMAC contends that it is not liable for breach of the duty of good faith and fair dealing because no such duty exists at common law in Maine, and because it did not dominate or control the debtors. GM does not directly discuss the merits of this claim, but, as indicated earlier, does make the general allegation that it is not liable pursuant to any count of the complaint because it was not the agent of GMAC. I note, at the outset, that the Law Court has recently cast doubt on the notion, set forth by this court in *Peoples Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 168-69 (D. Me. 1993), that the common law of Maine does not impose on parties to a contract a general implied duty of good faith and fair dealing. *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995); *but see Scott v. John T. Cyr & Sons*, 1995 Me. LEXIS 142 (June 19, 1995) (stressing that no such duty exists in employment contracts of indefinite duration).

The Law Court held in *Top of the Track* that the integration clause of a restaurant lease did not bar extrinsic evidence that the parties to the lease intended to be bound by such a duty. *Top of the Track Assocs*, 654 A.2d at 1296. It is a cryptic holding, but a riddle this court need not solve because, as the plaintiff points out, it relies not just on the common law but also on the duty of good faith that is very much present in the Maine version of the Uniform Commercial Code. *See Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 613 (Me. 1992) (UCC imposes duty of “objective good faith” on lending institutions in certain circumstances). The defendants do not contend that the UCC is inapplicable. Since I find no support for the notion that the plaintiff must demonstrate domination or control by the defendants in order to prove a breach of this duty, and since the plaintiff contends that GM is directly liable for such a breach, I need not address the contentions of the defendants that evidence of domination, control and agency are lacking. And, because neither GM or GMAC offers any other grounds for summary judgment on Count IV, the plaintiff's claim for breach of the duty of good faith and fair dealing survives.

For the same reasons, I do not recommend summary judgment in favor of the defendants on the counts alleging common-law conspiracy, breach of contract and common-law conversion. GMAC's general contention that it did not dominate or control the debtors is irrelevant since these are not elements of any of these torts. So, too, with GM's assertion that GMAC was not its agent; the complaint alleges direct GM involvement as to each of these claims. And, while I agree with the defendants that common-law conspiracy is not a freestanding tort in Maine but requires an underlying, independently recognized tort, *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972), the plaintiff alleges several such torts that I conclude should survive the summary judgment stage of the

proceeding. Again, neither defendant offers any further reason why it is entitled to summary judgment on these counts.

IX. Bankruptcy Issues

a. Equitable Subordination

What remain for consideration are the plaintiff's claims for relief pursuant to the Bankruptcy Code and analogous state statutes. Count I of the complaint invokes the court's power of equitable subordination pursuant to 11 U.S.C. § 510(c) and asks that the defendants' claims against the bankruptcy estate be subordinated to those of the other creditors. Count VI seeks judgment in the amount of certain allegedly preferential transfers from the debtors to the defendants made within one year of the bankruptcy filing, pursuant to 11 U.S.C. §§ 547 and 550. Pursuant to the same provisions, Count VII seeks judgment in the amount of certain allegedly preferential transfers made within 90 days of the filing. Counts VIII and IX alleges that certain fraudulent transfers from the debtors to the defendants took place prior to the bankruptcy, in violation of 11 U.S.C. §§ 548 and 550 as well as 14 M.R.S.A. §§ 3575-76. Finally, in Count XII the plaintiff alleges that GMAC wrongfully collected \$44,000 from the debtors subsequent to the bankruptcy filing, in violation of 11 U.S.C. §§ 362, 363 and 549.

The provision of the Bankruptcy Code authorizing equitable subordination permits the court to “subordinate for purposes of distribution all or part of an allowed claim [against the bankruptcy estate] to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.” 11 U.S.C. § 510(c)(1). The court may also order that any lien securing such a subordinated claim be transferred to the estate. *Id.* at subsection (c)(2). Enactment of section

510(c) represented a codification of then-existing common-law principles of equitable subordination. *In re M. Paolella & Sons, Inc.*, 161 B.R. 107, 117 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1487 (3d Cir. 1994).

A claim of equitable subordination requires proof of “inequitable conduct” that results in injury to other creditors or unfair advantage to the perpetrator of the conduct. *In re Giorgio*, 862 F.2d 933, 938 (1st Cir. 1988). Generally, there are three kinds of conduct that qualify as inequitable conduct for purposes of equitable subordination: (1) fraud, illegality or breach of fiduciary duties, (2) undercapitalization and (3) the offending creditor's use of the debtor as a mere instrumentality or alter ego. *In re Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991); *Paolella*, 161 B.R. at 117-18; *In re Hyperion Enters., Inc.*, 158 B.R. 555, 560 (D.R.I. 1993). If the creditor is an insider¹⁷ or fiduciary of the debtor, the party seeking to invoke equitable subordination bears the burden of presenting material evidence of unfair conduct, and, once done, the burden shifts to the creditor to prove the fairness of its transactions with the debtor. *Paolella*, 161 B.R. at 118. If the creditor is not an insider or fiduciary, the party seeking equitable subordination “must prove more egregious conduct such as fraud, spoliation or overreaching, and prove it with particularity.” *Id.* (quoting *In re N & D Properties, Inc.*, 799 F.2d 726, 731 (11th Cir. 1986)). In this context, the terms “insider” and “fiduciary” have a more expansive meaning than they do elsewhere in the law or even in the Bankruptcy Code; the issue is the extent to which the creditor exerted control over the debtor. *Paolella*, 161 B.R. at 118. “[A] non-insider creditor will be held to a fiduciary standard [for purposes of equitable subordination] only where [the creditor's] ability to command the debtor's

¹⁷ The Bankruptcy Code defines an “insider,” when the debtor is a corporation, as a director, officer or general partnership of the debtor corporation, or a “person in control of the debtor,” as well as any relatives of such a person in control. 11 U.S.C. § 101(31)(B). “Person” includes individuals, partnerships and corporations. *Id.* at subsection (41).

obedience to [its] policy directives is so overwhelming that there has been, to some extent, a merger of identity.” *Id.*

Relying principally on *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973), *rehearing denied*, 490 F.2d 916 (1974), GMAC contends that the plaintiff here may not assert an equitable subordination claim because GMAC did not dominate or control the debtors. Discussing liability of one corporation for the debts of another because the latter was an “instrumentality” of the former, the *Krivo* court required a showing “that the subservient corporation was being used to further the purposes of the dominant corporation and that the subservient corporation in reality had no separate, independent existence of its own.” *Id.* at 1105; *see also F.C. Imports, Inc. v. First Nat’l Bank of Boston, N.A.*, 816 F. Supp. 78, 91 (D.P.R. 1993). A corporation that is a debtor of another corporation does not *per se* become the creditor’s instrumentality where the creditor takes an active part in the management of the debtor; a showing is required even in these circumstances of “actual, participatory [and] total control.” *F.C. Imports, Inc.*, 816 F. Supp. at 91. GMAC contends that these principles require the court to find in its favor on the equitable subordination claim because Joseph continued to maintain day-to-day control over the dealerships, including the making of personnel decisions and determinations as to which creditors to pay, throughout the times relevant to this proceeding.

Krivo and *F.C. Imports* are not directly applicable. As the plaintiff points out, this is not a proceeding in which liability is premised on the instrumentality doctrine, which is a creature of general corporate rather than bankruptcy law. I agree, however, that nothing in the present record provides support for a finding that the Joseph dealerships were instrumentalities of GMAC or GM. While GMAC cast a mighty shadow over the dealerships at least as of the date GMAC installed its

keeper on the premises, nothing in the record would permit a factfinder to conclude that there had been a merger of identity between GMAC and the dealerships. The plaintiff has not demonstrated that GMAC or GM were fiduciaries or insiders for purposes of the doctrine of equitable subordination, which means the plaintiff must prove egregious conduct, such as fraud, with particularity. For reasons I have already discussed, such proof is lacking here. I conclude, therefore, that the defendants are entitled to summary judgment on Count I.

b. Preferential Transfers

The defendants next contend that the plaintiff's claims alleging preferential transfers must fail. GM contends that it simply received no such transfers. GMAC takes the position that any payments it received were not preferential ones.

Section 547 of the Bankruptcy Code permits a trustee in bankruptcy to avoid certain transfers made by a debtor that occur between 90 days and one year of the debtor's bankruptcy filing, and certain other transfers occurring on or within 90 days of the filing. 11 U.S.C. § 547(b) and (c). Although section 547 does not by its terms confer standing on any other parties to pursue claims for fraudulent transfers, the Bankruptcy Court authorized the plaintiff to pursue such claims and the defendants do not challenge its ability to do so. To qualify as a preferential transfer, such a transfer must be of an interest of the debtor in property that is to or for the benefit of a creditor, made for or on account of an antecedent debt owed by the debtor before the transfer, and the transfer must have been made while the debtor was insolvent. *Id.* at subsection (b)(1)-(3). The record reflects that the debtors were insolvent at least one year prior to their bankruptcy filings. The statute further sets forth that a transfer is preferential only if it enabled the creditor to receive more than the creditor

would have received if the bankruptcy were a liquidation pursuant to Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the creditor received payment on the debt as provided pursuant to a Chapter 7 liquidation. *Id.* at subsection (b)(5). Finally, there is the temporal requirement: All such transfers occurring in the 90 days before the bankruptcy filing qualify, as do transfers between 90 days and one year of the filing when the creditor was an insider at the time of the transfer. *Id.* at subsection (b)(4). As I shall discuss, certain transfers that would otherwise qualify are not considered preferential. *Id.* at subsection (c). The plaintiff invokes section 547 to seek recovery on what it characterizes as GMAC's "interception of open account payments" that otherwise would have been paid by GM to the debtors during the year prior to the bankruptcy. Complaint ¶¶ 131, 138.

The plaintiff does not contest GM's assertion that it received no transfers during the year preceding the bankruptcy filing. Instead, the plaintiff invokes the language elsewhere in the Bankruptcy Code that when the trustee may avoid a transfer under section 547, the trustee may recover the value of the transferred property not just from the initial transferee but also from "any immediate or mediate transferee of such initial transferee." 11 U.S.C. § 550(a)(1) and (2). Clearly, section 550 provides a basis for holding subsequent transferees liable for preferential transfers. In support of its factual assertion that it received no transfers within the meaning of section 550(a), GM cites to the plaintiff's answer, in response to a GM interrogatory, that the plaintiff was not aware in December 1994 that any such transfers had been received by GM. Were that lack of awareness on the part of the plaintiff to be presented to a factfinder, it would not be competent evidence as to the non-existence of such transfers absent some basis for the unsecured creditors of the Joseph dealerships to have knowledge of financial transactions between GM and one of its subsidiaries.

Nevertheless, I agree with GM that it is entitled to summary judgment on the plaintiff's claim of preferential transfers. In support of its theory of liability pursuant to section 550(a), the plaintiff refers the court to copies of GM's annual reports for 1990, 1991, 1992 and 1993 and contends that “[i]t *appears* that during this 1990 through 1993 time frame GMAC *may* have been acting only as the loan servicing agent for GM.” Plaintiff's Memorandum of Law in Opposition to General Motors Corporation's Motion for Summary Judgment (Docket No. 86) at 21 (emphasis added). Assuming that these annual reports are validly part of the summary judgment record -- and the plaintiff offers nothing to suggest that they are -- I find in them nothing from which a factfinder could, without indulging in speculation, conclude that GMAC transferred to GM payments it had received from these debtors. Since it is standing in the shoes of a trustee in bankruptcy, the plaintiff generally bears the burden of proof on its claims of preferential transfers. *See* 11 U.S.C. § 547(g) (allocating burden of proving avoidability to trustee). Summary judgment is appropriate “against a party [that] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322; *see also Hayes v. Larsen's Mfg. Co.*, 871 F. Supp. 56, 58 (D. Me. 1994) (summary judgment appropriate when plaintiff with burden would be entitled to directed verdict if summary judgment record constituted trial record). The failure of the plaintiff to come forward with any evidence from which a factfinder could reasonably conclude that GM received any section 550 transfers is fatal to its claim to that effect against GM.

For its defense, GMAC relies first on two provisions of section 547 that except certain transfers that would otherwise qualify as preferential, *i.e.*, transfers that create certain security interests in property acquired by the debtor or transfers that create a perfected security interest in the

debtor's inventory or receivables. *See* 11 U.S.C. § 547(c)(3) and (5). The transfer of funds to GMAC that were otherwise owed to GM did not create any security interests and these exceptions accordingly do not directly apply. However, the open account payments at issue were diverted to GMAC because GMAC held a security interest in the debtor's inventory and receivables. “[T]he creation of a perfected security interest in property is *itself* a preference when the creation or perfection takes place during the preference period (and the other criteria are satisfied).” *In re Melon Produce, Inc.*, 976 F.2d 71, 74 (1st Cir. 1992) (emphasis in original). Thus, the First Circuit held in *Melon Produce* that certain payments made by the debtor to a secured creditor were, in fact, preferential ones even though, in a Chapter 7 liquidation, such a creditor normally receives the value of the property in which it holds a perfected security interest. *Id.* And, significantly for present purposes, the court went on to note that subsection (c)(5) provides a safe haven in such circumstances where a creditor provides the debtor with a floating lien on inventory and receivables that turn over quickly. *Id.* at 75. Thus, a party may extend credit in this manner without fear of a preference attack on new accounts receivable arising during the preference period. *Id.*

The exception protects new receivables from preference challenges, however, only insofar as they *substitute* for old ones. Insofar as the grant of a security interest in the new collateral (receivables or inventory that comes into existence during the preference period) *improves* the creditor's position (compared to [its] position at the beginning of the preference period), the grant of security constitutes a preference to the extent of the improvement.

Id. GMAC itself admits at least the possibility that its position was improved by virtue of the open account payments.¹⁸ Moreover, the creditor has the burden of demonstrating that it is entitled to rely

¹⁸ According to GMAC's statement of material facts not in dispute,

[w]ith the possible exception of no more than \$37,201.39, all payments received by GMAC from open account monies and non-purchase money proceeds of vehicle
(continued...)

on the provisions of section 547(c). *See* 11 U.S.C. § 547(g). Having failed to do so, GMAC is not entitled to summary judgment on the plaintiff's claims for preferential transfers.

c. Fraudulent Transfers

The defendants also seek summary judgment on the plaintiff's claim of fraudulent transfers pursuant to the Bankruptcy Code. GM contends it is entitled to summary judgment on this claim because it received no transfers within a year of the bankruptcy filing and because it held no liens on the debtors' property. GMAC contends it is entitled to summary judgment as to fraudulent transfers because the plaintiff cannot make out the necessary proof to sustain the claims.

In relevant part, section 548 of the Bankruptcy Code permits a bankruptcy trustee to avoid any transfer of an interest in a debtor's property within a year of the bankruptcy filing in two sets of circumstances. 11 U.S.C. § 548(a). In the first instance, the debtor must have, either voluntarily or involuntarily, “made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted[.]” *Id.* at subsection (a)(1). In the second instance, a transfer is avoidable if the debtor

received less than a reasonably equivalent value in exchange for such transfer or obligation; and . . . was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; . . . was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an

¹⁸(...continued)

sales during the one year period prior to the filing of Joseph Motor and Joseph Subaru's Bankruptcy Petitions were applied to interest and charges accruing after the beginning of that period.

unreasonably small capital; or . . . intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Id. at subsection (a)(2).

In connection with the section 548 claim, GM raises the same objection as it did to the plaintiff's claims for preferential transfers. As it does with section 547 preferential transfers, section 550 provides that a trustee in bankruptcy may avoid fraudulent transfers to both the initial transferee and any immediate or mediate transferee of the initial transferee. See 11 U.S.C. § 550(a). And, as with claims of preferential transfers, the party seeking to avoid a fraudulent transfer carries the burden of proof. *In re Besing*, 981 F.2d 1488, 1494 (5th Cir.), *cert. denied*, 126 L. Ed. 2d 47 (1993). The record is devoid of any evidence that GM received, either directly or indirectly, any transfers from the debtors during the relevant period. Accordingly, for the reasons I have already discussed, GM is entitled to summary judgment on the section 548 claim.

GMAC first contends that there is nothing in the record to suggest that the plaintiff could meet its burden in demonstrating that there were any transfers made from the debtors to GMAC “with actual intent to hinder, delay, or defraud” any of the other creditors as required by section 548(a)(1). The plaintiff resists by pointing to the record evidence of GMAC's efforts to conceal the presence on the debtors' premises of its keeper and otherwise make it appear both to the debtors and to the rest of the world that it was “business as usual” at the dealerships. But, as GMAC notes, it is not the intent of the transferee-creditor that is at issue. See, e.g., *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254-55 (1st Cir. 1991) (discussing traditional “badges of fraud” used to generate circumstantial evidence that debtor engaged in fraudulent transfer). It does appear that in certain circumstances the court will impute to the debtor the fraudulent intent of one who controls the assets of the debtor. See, e.g., *In re Acequia, Inc.*, 34 F.3d 800, 805 (9th Cir. 1994)

(transfers made by debtor's chief operating company to himself satisfied intent requirement of section 548). I conclude, however, that nothing in the circumstances of this case operates to make the intent of GMAC relevant in considering transfers made by the debtors to GMAC in the year preceding the bankruptcy filing. And, of course, there are no allegations that the debtors had as their purpose “to prevent [other] creditors from obtaining satisfaction of their claims against the debtor[s] by removing the property from their reach.” *Max Sugarman Funeral Home*, 926 F.2d at 1254 (citations omitted).

But when a party seeking to avoid a transfer cannot demonstrate actual fraud, it may also invoke the alternative method of proof, commonly referred to as “constructive fraud.” *See, e.g., In re The One Bancorp Sec. Litigation*, 151 B.R. 1, 3 (D. Me. 1993). GMAC further contends that the plaintiff cannot meet the elements of constructive fraud either.

As I have already noted, it is uncontested that the debtors were insolvent during the year preceding the bankruptcy filing and, thus, this element of constructive fraud is met. GMAC relies on an asserted failure by the plaintiff to come forward with evidence that the debtors received less than equivalent value in exchange for any property they transferred to GMAC. Apparently conceding, at least for summary judgment purposes, that it received open account payments from GM in satisfaction of loan obligations entered into by Joseph (as opposed to the dealerships themselves), GMAC contends that the dealerships received equivalent value for these transfers because the dealerships had guaranteed Joseph's loan obligations. Motion of GMAC for Summary Judgment (Docket No. 71) at 27.

For purposes of section 548, “value” is defined in relevant part as “property, or satisfaction or securing of a present or antecedent debt of the debtor.” *See* 11 U.S.C. § 548(d)(2)(A). Noting that “[a]ntecedent debt may be described as a debt preexisting or prior to the transfer,” that a debt is a

liability on a claim, and that the Bankruptcy Code specifies that a “claim” includes a right to payment even if the right is contingent, one bankruptcy court has concluded that reduction of a debtor's contingent liability constitutes “value” within the meaning of section 548. *See In re Cavalier Homes of Georgia, Inc.*, 102 B.R. 878, 885-86 (Bankr., M.D. Ga., 1989). The court further concluded that the debtor received value that was reasonably equivalent because the transfer reduced the amount of the debt, and accordingly the amount of the debtor's contingent liability, by the same amount. *Id.* at 886. The plaintiff contends that GMAC's argument based on *Cavalier Homes* is not dispositive because there is a question of fact concerning what value the debtors received in exchange for giving Joseph their guarantee. The plaintiff does not explain why the value received by the debtors in a transaction with Joseph is relevant to the determination of whether, and to what extent, the debtors received value in a transaction with GMAC. I agree with GMAC that the debtors received reasonably equivalent value for any payments made to GMAC during the year preceding the bankruptcy, and accordingly that no transfers occurred that were constructively fraudulent within the meaning of section 548.¹⁹

X. The Maine Uniform Fraudulent Transfers Act

Unlike the federal Bankruptcy Code, the Maine Uniform Fraudulent Transfers Act (“UFTA”) does not limit relief to transfers occurring within one year of a bankruptcy filing; the state law provides a broad remedy for all creditors who have been defrauded by such a transfer. *See* 14

¹⁹ One other Bankruptcy Act claim remains. Count XII of the complaint alleges that GMAC wrongfully received certain funds from the debtors following the bankruptcy filing, in violation of 11 U.S.C. §§ 362, 363 and 549. The plaintiffs do not contest GMAC's assertion that it is entitled to summary judgment on this claim because all post-petition transfers it received were authorized by the bankruptcy court. Obviously, to the extent that Count XII seeks to state a claim against GM, it is also entitled to summary judgment in its favor.

M.R.S.A. § 3578. The plaintiff's claim for relief pursuant to UFTA is much broader, covering payments received from the debtors by GMAC, in satisfaction of debts actually owed by Joseph or one of his other dealerships, during the six years prior to the bankruptcy filings. *See* Complaint ¶ 154. The claim also includes the defendants' taking guarantees and security agreements from the debtors to secure obligations of Joseph and his other dealerships. *See id.* ¶ 162. The plaintiff contends that all of these transactions either took place at a time when the debtors were insolvent or caused the debtors to become insolvent and that the debtors received less than equivalent value in these transactions.

I agree with GM that the record reveals no evidence on which it could be liable even under the broadly stated UFTA claim. Unlike the Bankruptcy Code, UFTA contains no provision subjecting subsequent transferees to liability. And the record is devoid of anything from which the court could conclude that GM was a party to any of the financial transactions at issue in the UFTA claim.

GMAC contends it is not subject to UFTA liability because the record demonstrates no intent to defraud on the part of the debtors and because the debtors did not receive less than equivalent value in connection with every transaction that forms a basis for the UFTA claim. Section 3575 of UFTA is analogous to section 548 of the Bankruptcy Code and provides:

1. **Fraudulent transfer.** A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

A. With actual intent to hinder, delay or defraud any creditor of the debtor; or

B. Without receiving a reasonably equivalent value in exchange for the transfer or obligations and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as the debts became due.

14 M.R.S.A. § 3575(1). Subsection (2) sets forth certain factors the court may consider in determining actual intent for purposes of section 3575. Among the factors are whether the transfer or obligation was to an insider, whether the transfer was of substantially all of the debtor's assets, whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, and whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. *Id.* at subsection (2). Section 3576 provides a broader definition of fraudulent transfers, applicable only to claims made by creditors whose claims antedate the transfer or obligation at issue. *See* 14 M.R.S.A. § 3576. This section “allows an existing creditor to avoid a transfer for inadequate consideration which leaves the debtor insolvent. . . . [I]ntent, actual or implied, is irrelevant.” *Id.*, Maine Comment at (1). Section 3576 also provides that a transfer is fraudulent as to a present creditor “if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time and the insider had reasonable cause to believe that the debtor was insolvent.” *Id.* at subsection (2).

I agree with GMAC that there is nothing in the record from which a factfinder could conclude that the debtors acted in their transactions with GMAC with intent to hinder, delay or defraud any of their creditors. GMAC further contends that it is not subject to UFTA liability because the debtors did not receive less than equivalent value in any of the cited transactions. As to payments

made by the debtors to GMAC in the year preceding the bankruptcy, my previous determination pursuant to section 548 that the debtors received equivalent value is dispositive. *See* 14 M.R.S.A. § 3574 (defining “value”) and Commissioners' Comment (suggesting that the definition is based on section 548 of the Bankruptcy Code). As to transactions between the debtors and GMAC prior to the pre-bankruptcy year, the plaintiff contends that “there is a real question of what, if any, value the Debtors received in exchange for the guarantees of the various Herb Joseph debts which were ultimately paid down through GMAC's collection efforts.” Plaintiff's Objection to GMAC Motion (Docket No. 84) at 22. It points in particular to the \$600,000 loan extended to Joseph in 1990 and guaranteed by the debtors. GMAC contends that certain subrogation rights obtained by the dealerships against Joseph satisfy the requirement of equivalent value because Joseph had a positive net worth both before and after the transactions at issue. The plaintiff responds by contending that Joseph's net worth is a disputed factual issue. I conclude that the question of what value the debtors received in connection with the loan transactions is a disputed issue of fact that precludes summary judgment in GMAC's favor on the UFTA claim.

XI. The Plaintiff's Right to Jury Trial

Finally, the court confronts GMAC's motion to strike the plaintiff's demand for a jury trial. GMAC contends, pursuant to Fed. R. Civ. P. 38(d), that the plaintiff waived any right to jury trial by failing to make such a demand at the outset of the previous action filed in the bankruptcy court. In the alternative, GMAC's position is that the instant proceeding is an equitable one in which the plaintiff does not enjoy the right to trial by jury. Finally, GMAC contends that certain stipulations entered into by the debtors in the bankruptcy court, regarding the use of cash collateral, operate as

a waiver of the right to jury trial as to claims asserted on behalf of the bankruptcy estate. The plaintiff's response to the first argument is that it could not have waived any rights pursuant to Rule 38 in the bankruptcy court because no provision for seeking a jury trial existed in that court prior to May 1994. As to the second contention, the plaintiff takes the position that its claims are properly regarded as legal in nature, and thus a right to jury trial attaches. And as to the effect of the stipulations, the plaintiff points to orders of the bankruptcy court stating that the stipulations as to use of cash collateral shall not restrict the ability of any duly appointed creditors committee to pursue claims against GMAC.

Fed. R. Civ. P. 38(b) provides that any party may demand a jury trial, as to issues triable to a jury, by serving such a demand on the other party or parties and filing the demand with the court within ten days of the service of the last pleading directed to the issue or issues for which jury trial is sought. Rule 38(d) explicitly provides that the failure to follow the procedure outlined in subsection (b) constitutes a waiver by the party of trial by jury. As the plaintiff notes, Maine Bankruptcy Rule 7008(c) specifies in relevant part that “[i]n any case in which a party asserts a right to trial by jury, the jury trial demand shall be set forth in accordance with Fed. R. Civ. P. 38.” Subsection (c) became effective on May 1, 1994; prior to that date and during all times relevant to this proceeding the local bankruptcy court rules contained no provision for seeking a jury trial.

The bankruptcy court authorized the plaintiff to pursue claims against GMAC on December 2, 1992. The plaintiff instituted such an action against GMAC in the bankruptcy court by filing a complaint there on January 3, 1993. The complaint did not contain a demand for jury trial, and included claims for equitable subordination, breach of fiduciary duties to both the debtors and their creditors, breach of the duty of good faith and fair dealing, one-year and 90-day preferential transfers,

fraudulent transfer pursuant to the Bankruptcy Code and Maine UFTA, and intentional interference with contract. The bankruptcy court authorized the plaintiff to pursue claims against GM on March 22, 1994. On May 31, 1994 -- less than a month after the promulgation of Rule 7008(c) -- the plaintiff filed its first amended complaint, adding GM as a defendant, containing a demand for jury trial and adding claims for breach of contract, sales tax liability, post-petition transfers, common-law conversion, the federal and state automobile dealers' statutes, fraud, RICO, and civil conspiracy. The plaintiff instituted the present proceeding on April 13, 1994 with a complaint including a demand for jury trial. Subsequent pleadings by the plaintiff have continued to make such a demand. The bankruptcy court stayed the proceedings there pending the outcome of this litigation and this court has withdrawn the reference of those matters to the bankruptcy tribunal.

It is clear from the foregoing that the only sense in which the plaintiff could have waived any right to a jury trial it would otherwise enjoy would be if it had been required to make such a demand in its initial complaint notwithstanding the lack of a provision in the bankruptcy court's rules for making such a demand at that time. In that regard, I note that Congress acted last year to authorize bankruptcy judges to conduct jury trials when authorized to do so by the district court and with the consent of the parties.²⁰ See 28 U.S.C. § 157(e); P.L. 103-394, 108 Stat. 4106, 4117 (1994). This court vested such authority in the bankruptcy judges of the district effective in January 1995. See Local Rule 23(e). Prior to that date, nothing prevented the plaintiff from filing its initial claim in this court, where there was never any question of the court's authority to conduct jury trials and where

²⁰ Congress acted in the wake of *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), in which the Supreme Court held that the recipient of an allegedly fraudulent conveyance enjoyed a Seventh Amendment right to jury trial when sued in the bankruptcy court by a bankruptcy trustee. See *id.* at 36; H.R. Rep. No. 103-835, 103rd Cong., 2d Sess. (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3350.

the plaintiff's initial complaint, lacking a jury trial demand, would have amounted to a waiver of the right to jury trial pursuant to Rule 38(d).

The Supreme Court has made clear that a creditor does not waive any right to a jury trial simply through the act of submitting itself to the equity jurisdiction of the bankruptcy court. *Granfinanciera*, 492 U.S. at 59 n.14. This is because “creditors lack an alternative forum to the bankruptcy court in which to pursue their claims” against the bankruptcy estate. *Id.* By filing a claim against a bankruptcy estate, a creditor triggers the process of allowing and disallowing claims -- a process that is equitable in nature and does not implicate the right to trial by jury. *Id.* at 58-59; *see also Langenkamp v. Culp*, 498 U.S. 42, 44 (1990). If the bankruptcy trustee reacts by filing a preference action against the creditor, both the claim and the preference action remain part of the equitable process of restructuring the debtor-creditor relationship, and still no right to jury trial attaches. *Id.* at 44-45. If a creditor has not submitted a claim against the bankruptcy estate, however, the trustee can only recover preferential transfers from that creditor by filing a legal action in which there *is* the right to trial by jury. *Id.*; *Granfinanciera*, 492 U.S. at 58-59. The Eighth Circuit has recently applied this principle to a case in which a creditor filed but then withdrew a claim, holding that the creditor was therefore still entitled to a jury trial when the bankruptcy trustee instituted adversarial proceedings. *See Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995).

This case -- either in its present guise or as presented to the bankruptcy court -- is not within the claims allowance or disallowance process that is inherently within the equity jurisdiction of the bankruptcy court. Rather, here the plaintiff stands in the shoes of a bankruptcy trustee who has only one avenue of potential recovery against these defendants, *i.e.*, the filing of a legal action. “[S]uits . . . which would augment the [bankruptcy] estate but which have no effect on the allowance of a

creditor's claim simply cannot be part of the claims-allowance process,” thus precluding trial by jury. *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323, 1327 (2d Cir. 1993). By no means would the individual creditors, whom I have already determined are not entitled to use this proceeding to vindicate claims that are personal to them, be entitled to a jury trial; they have crossed the threshold of the equitable claims allowance and disallowance process. And the court would be faced with a very different problem if GMAC were seeking rather than resisting a jury trial. To the extent that its claims seek legal relief, the plaintiff enjoyed a right to trial by jury when it filed its initial complaint. That, however, is not the end of the matter. At the time of that initial filing, the plaintiff had the option of bringing its case here or in the bankruptcy court. Having chosen the latter, where there was no right to a jury trial (and where there is no right even now, absent consent of all parties), the plaintiff waived its right to trial by jury on all claims presented in that complaint. *See Granfinanciera*, 492 U.S. at 59 n.14 (noting that a party that has choice between two forums, one permitting jury trials, waives trial by jury by not choosing appropriate forum).

The question thus becomes what effect the subsequent pleadings have on the plaintiff's waiver.

A right to jury trial which has been waived under Rule 38 may be revived by an amended or supplemental pleading raising new issues. However, the rule in this District is that a previously waived right to a jury trial is not revived by an amended or supplemental pleading that does not raise new issues. Moreover, the applicable principle is that a jury trial may be demanded only as to any new issues introduced by the amendment and not as to the former issues.

Bonney v. Canadian Nat'l Ry. Co., 100 F.R.D. 388, 390 n.1 (D. Me. 1983) (citations omitted). The plaintiff's amended complaint raises new issues on which trial by jury has been demanded in a timely manner. Preeminent, of course, is the addition of GM as a defendant. To the extent that these issues

survive the summary judgment motion -- and my recommendation is that many of them should not -- the plaintiff is entitled to present to a jury those claims that would otherwise be so triable.

XII. Conclusion

For the foregoing reasons, I recommend that GM's motion to dismiss the plaintiff's RICO claims against it be **GRANTED**; that GM's motion for summary judgment be **GRANTED** as to Counts VI (one-year preferential transfers), VII (90-day preferential transfers) and IX (Uniform Fraudulent Transfers Act); that GMAC's motion for summary judgment be **GRANTED** as to Counts XVIII through XXIII (RICO); that both defendants' motions for summary judgment otherwise be **GRANTED** as to Counts I (equitable subordination), II and III (breach of fiduciary duties), VII (fraudulent transfers), X (intentional interference with contract), XI (sales tax liability), XII (post-petition transfers), XVI (fraud) and XVII (negligent misrepresentation) and otherwise **DENIED**; and that GMAC's motion to strike the plaintiff's demand for jury trial be **GRANTED IN PART** so as to permit trial by jury only on issues not raised in the plaintiff's initial complaint filed in the bankruptcy court.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of August, 1995.

David M. Cohen
United States Magistrate Judge